(23,618)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 1043.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, AND MAMIE HENKEL, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 14, 1913.

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No. 2094

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, AND MAMIE HENKEL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court of the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

Messrs. WALSH & NOLAN, of Helena, Montana,
Attorneys for Defendants and Plaintiffs in Error.

JAMES W. FREEMAN, Esq., United States Attorney, of Helena, Montana,
Attorney for Plaintiff and Defendant in Error.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 1057.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,
Defendants.

BE IT REMEMBERED, that on May 17th, 1911, the United States filed its Complaint herein, which said Complaint is in the words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,

Defendants.

Complaint.

Now comes the United States of America by James W. Freeman, United States Attorney for the District of Montana, and for cause of action alleges:

1. That said Henry Henkel is not an Indian, and at all of the times hereinafter mentioned, and does now, reside with the balance of the above-named defendants, which constitute his family, upon the Blackfeet Indian Reservation, and upon the lands hereinafter described, in the State and district of Montana.

2. That the said defendants, Caroline Henkel, Lizzie Henkel, Mamie Henkel, George Henkel and William Henkel are members of the Piegan tribe of Indians and wards of the Government of the United States, and at all the times hereinafter mentioned, and do now, reside upon the Blackfeet Indian Reservation, and upon the lands hereinafter described, in the State and District of Montana.

3. That previous to the 5th day of November, A.

D. 1906, the plaintiff, in pursuance of the Act of Congress approved June 17th, A. D. 1902 (32 Statutes at Large, 388), made investigations of, and surveys for, what is known as the Milk River Irrigation Project, which lies in the northern part of the State and district of Montana, and for the purpose of supplying water to irrigate said project, it was shown to be necessary to build a reservoir known as the St. Mary Reservoir, in the said State and district [2] of Montana, by making use of what is known as the lower St. Mary Lake, by the construction of a dam at the foot of said lake, for the purpose of storing the water for said Milk River Irrigation Project. That the lands hereinafter described were and are necessary for flowage and construction purposes in connection with the construction of said irrigation project.

4. That on and previous to the 5th day of November, A. D. 1906, the said defendants, who are described as members of the Piegan tribe of Indians as aforesaid, had settled upon and occupied certain lands embracing about eight hundred acres, situated at the foot of said lower St. Mary Lake and south of what is known as Swift Current Creek, on said Blackfeet Indian Reservation, and had placed upon said lands, buildings and improvements of various kinds and descriptions. That at all times previous to the 15th day of February, A. D. 1907, the said defendants, who are described hereinabove as members of the said Piegan tribe of Indians as aforesaid, were lawfully entitled to occupy and be in possession of said lands by virtue of their being wards of

this plaintiff, and of the laws, customs and tribal regulations of the Indians living and residing upon the said Blackfeet Indian Reservation, and by permission of this plaintiff.

5. That on said 5th day of November, A. D. 1906, the said defendants made and executed that certain paper writing, a copy of which said paper writing is hereto attached marked exhibit "A," and made a part hereof, wherein and whereby the said defendants agreed to relinquish all their claims to all the lands and all buildings then occupied by them on said Blackfeet Indian Reservation, in the said State and district of Montana, as described, for a consideration of Seven Thousand Five Hundred Dollars.

6. That thereafter, on the 15th day of February, 1907, this plaintiff paid the said defendants the said sum of Seven Thousand [3] Five Hundred Dollars, upon the payment of which said sum the said defendants did then and there relinquish to plaintiff all their rights, titles and claims in or to all lands and buildings then occupied by them on said Blackfeet Indian Reservation, in said State and district of Montana, located at the foot of lower St. Mary Lake and south of said Swift Current Creek, and did by said relinquishment release the said United States from all claims for damages to all improvements of whatsoever kind and character situated thereon, a copy of which said relinquishment is hereto attached marked Exhibit "B," and made a part hereof.

7. That by virtue of the payment of the said Seven Thousand Five Hundred Dollars by the plaintiff to the said defendants, who are members of the

said Piegan tribe of Indians as aforesaid, the said plaintiff became and was entitled to the possession of all of the rights, titles and claims in and to all lands and buildings occupied by the said Caroline Henkel, George Henkel, Lizzie Henkel, Mamie Henkel and William Henkel, the said Henry Henkel having no right, title, or interest in or to any of said lands, and only being allowed upon said Blackfeet Indian Reservation by permission of this plaintiff by reason of the fact that the said Caroline Henkel was his wife and a ward of the Government of the United States, and the remaining of the said defendants being the children of said Henry Henkel and Caroline Henkel.

8. That at the time of the purchase of all of the right, title and interest in and to the lands occupied by the said defendants, and each of them, as hereinabove set forth and described, and the improvements, the said lands were unsurveyed, but said lands have since said date been surveyed, and the lands which the plaintiff seeks to secure possession of in this connection from the said defendants, and each of them, are described as all those lands within the boundaries of the red lines, as the same appears on [4] the plat marked exhibit "C" hereto attached and made a part hereof, and which said lands are the same lands described and intended to be described in said exhibits "A" and "B" hereto attached and made a part hereof as aforesaid.

9. That the plaintiff is entitled to the immediate possession of said lands hereinabove described.

10. That the defendants are in possession thereof,

and are wrongfully withholding the same from the plaintiff.

11. That the value of the rents, uses and profits of said premises from the said 15th day of February, 1907, and while the plaintiff has been excluded therefrom by the defendants, is One Thousand Dollars.

WHEREFORE plaintiff demands judgment,

1. For the possession of said described premises.

2. That the plaintiff is entitled to the same in fee simple.

3. To recover One Thousand Dollars damages for withholding the same.

4. For the sum of One Thousand Dollars, the value of said rents, uses, and profits, and for costs of suit.

JAS. W. FREEMAN,
United States Attorney, District of Montana. [5]

United States of America,
District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the regularly appointed, qualified and acting United States Attorney in and for the District of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

JAS. W. FREEMAN.

Subscribed and sworn to before me this 17th day of May, A. D. 1911.

[Seal] S. C. FORD,

Notary Public for the State of Montana, Residing at Helena.

My commission expires Sept. 7, 1912. [6]

Exhibit "A" [to Complaint].

Babb, Montana, November 5, 1906.

Commissioner of Indian Affairs,

Washington, D. C.

Sir:

I, Caroline Henkel, for myself and my two daughters, Lizzie and Mamie Henkel, and we, George and William Henkel, respectively, members of the Piegan tribe of Indians, hereby agree to relinquish all claims to all lands and all buildings now occupied by us on the Blackfeet Indian Reservation, Montana, and comprising about 800 acres. These lands are situated at the foot of Lower St. Mary Lake and south of Swiftcurrent Creek.

The conditions of our surrender of such lands to the Government for use in connection with the proposed St. Mary Reservoir of the U. S. Reclamation Service, are that we shall be paid the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00)—in cash for the improvements on such selections and that we may subsequently be allowed to select allotments of equal area, or as provided by law,

from the unoccupied lands of the Blackfeet Reservation, Montana.

Very respectfully,

Her

CAROLINE X HENKEL.

Mark

GEORGE HENKEL.

WILLIAM HENKEL.

Witnesses:

C. T. PRALL.

CYRUS C. BABB.

I, Henry Henkel, husband of the above Caroline Henkel and father of Lizzie, Mamie, George and William Henkel, hereby concur in all of the provisions of the foregoing agreement.

Very respectfully,

HENRY HENKEL.

Witnesses:

C. T. PRALL.

CYRUS C. BABB. [7]

Exhibit "B" [to Complaint].

Babb, Montana, February 15, 1907.

In consideration of the sum of Seven thousand five hundred dollars ($7,500), to Caroline Henkel in hand paid, the receipt of which is hereby acknowledged, I, Caroline Henkel, for myself and my two daughters, Lizzie and Mamie Henkel, and we, George and William Henkel, hereby relinquish to the United States all our rights, titles and claims in or to all lands and buildings now occupied by us on the Blackfeet Indian Reservation, Montana, and located at the foot of Lower St. Mary Lake and south of Swift

Current Creek, and also do hereby release the United States from all claims for damages to all improvements of whatsoever nature thereon.

Her
CAROLINE X HENKEL.
Mark
GEORGE HENKEL.
WILLIAM HENKEL.

Witnesses:

E. L. HENDRIX.
ELMO A. BROWN.

I, Henry Henkel, husband of the above Caroline Henkel and father of Lizzie, Mamie, George, and William Henkel, hereby concur in all the provisions of the foregoing agreement.

HENRY HENKEL.

Approved:

CYRUS C. BABB,
District Engineer.

Approved:

JAMES RUDOLPH GARFIELD,
.....
Secretary of the Interior.

Approved:

H. N. SAVAGE,
Supervising Engineer. [8]

MAPS

TOO

LARGE

FOR

FILMING

[Endorsed]: Title of Court and Cause. Complaint. Filed May 17, 1911. Geo. W. Sproule, Clerk.

And thereafter, to wit, on May 17, 1911, summons was duly issued herein, being in the words and figures following, to wit: [10]

[Summons.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, and MAMIE HENKEL,

Defendants.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting: To the Above-named Defendants, Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel,

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court a copy of which is herewith served upon

you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 17th day of May, in the year of our Lord one thousand nine hundred and eleven, and of our Independence the 135.

[Seal] GEO. W. SPROULE,
Clerk.

By .....,
Deputy Clerk. [11]

[Endorsed]: No. 1057. U. S. Circuit Court, 9th Circuit, District of Montana. United States of America, vs. Henry Henkel et al. Summons. Jas. W. Freeman, U. S. Atty., Plaintiff's Attorney. Helena, Montana. Filed May 26th, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [12]

United States of America,
District of Montana,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Henry Henkel by handing to and leaving with him a true copy thereof, together with a true copy of the complaint in said action; and on Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel by handing to and leaving a true and correct copy thereof with each personally at 2 mi. S. of Babb,

Teton County, in said District, on the 23d day of May, A. D. 1911.

WILLIAM LINDSAY,
U. S. Marshal.
By J. W. Haigler,
Deputy. [13]

And thereafter, to wit, on May 23, 1911, defendants filed their demurrer herein, which is in the words and figures following, to wit: [14]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,
Defendants.

Demurrer [to Complaint].

Come now the defendants above named, and demur to the complaint of the plaintiff in the above-entitled cause, for that:

I.

The Court has no jurisdiction of the subject matter of the said action.

II.

That the Complaint does not state facts sufficient to constitute a cause of action.

WALSH & NOLAN,
Attorneys for Defendants.

Due personal service of within Demurrer made and admitted and receipt of copy acknowledged this 23d day of May, 1911.

J. W. FREEMAN,
Attorney for Plaintiff.

[Endorsed]: Title of Court and Cause. Demurrer. Filed May 23, 1911. Geo. W. Sproule, Clerk. [15]

And thereafter, on June 5, 1911, an order overruling demurrer was duly made and entered herein in the words and figures following, to wit:

[Order Overruling Demurrer [to Complaint].

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 1057.

UNITED STATES
vs.
HENRY HENKEL et al.

This cause, heretofore submitted to the Court upon demurrer, came on regularly at this time for the judgment and decision of the Court, and, after due consideration, it is ordered that said demurrer be and hereby is overruled.

Entered, in open court, June 5, 1911.

GEO. W. SPROULE,
Clerk. [16]

And thereafter, to wit, on June 5, 1911, the Memorandum Opinion of the Court was duly filed herein, which is in the words and figures following, to wit: [17]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,

Defendants.

Memorandum Opinion [on Demurrer to Complaint].

In support of the defendants' demurrer to the complaint it is insisted that the agreement made by the defendants on November 5th, 1906, and the instrument executed on February 15th, 1907, whereby the defendants relinquished all rights, title or claim to the lands which they were then occupying at the foot of Lower St. Mary Lake, are void and inoperative, for the reason that the transaction is in effect a transfer or assignment of the defendant's right to an allotment upon the Reservation as tribal Indians and wards of the Government, which the defendants could not legally make, and which the officers and agents of the United States could not legally accept, because of the restrictions with respect to the right

and power of alienation imposed upon allottees by the provisions of the allotment law of 1887. The land in question was a part of the Blackfeet Indian Reservation, established and set apart for the uses of the Blackfeet Indians by the Act of May 1, 1888, and was occupied by the defendants, all of whom, except the defendant Henry Henkel, are tribal Indians and wards of the Government, as such tribal [18] Indians and wards of the Government "and by permission" of the plaintiff, the United States. No rights under the general allotment Act were, and, as will be presently seen, could have been acquired by the defendants entitling them to hold possession of the land to the exclusion of everybody else. Not only was the general allotment Act not applicable to any of the lands embraced within the Blackfeet Reservation, but it could not have been made operative by the means or in the manner provided for in the Act upon any part of that reserve. Under the allotment Act, an Indian reservation may be allotted, but whether it shall be, depends upon the action of the President of the United States, who may whenever, according to the provisions of the Act, "in his opinion any reservation is advantageous for agricultural or grazing purposes," cause it to be surveyed and allotted in severalty to the Indians thereon.

But at the time of the execution of the instruments in question by the defendants no such authority existed with respect to the lands within the Blackfeet Indian Reservation. There was then in force the agreement between the United States and the Black-

feet Indians ratified and confirmed by the Act of Congress on June 10, 1896, the fifth article of which reads as follows:

> "Since the situation of the Blackfeet Reservation renders it wholly unfit for agriculture, and since these Indians have shown within the past four years that they can successfully raise horned cattle, and there is every probability that they will become self-supporting by attention to this industry, it is agreed that during the existence of this agreement no allotments of land in severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract upon which their herds may feed undisturbed; and that after the expiration of this agreement the lands shall continue to be held until such time as the majority of the adult males of the tribe shall request in writing that allotment in severalty shall be made of their lands: *Provided,* That any member of the tribe may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of [19] such description shall give the said members of the tribe the right to take such land when allotments of the land in severalty shall be made." (29 St. at L. 355.)

By a compliance with the requirements of the proviso any Indian would acquire a preference right to

select as an allotment the particular tract which, with the approval of the Indian Agent, he had enclosed by a fence and a description of which had been filed with the agent. There was no law providing for or authorizing the making of allotments upon the reserve, and the question whether and when, if at all, the reservation should be allotted, was one for the determination of the Indians themselves. It is true the Act providing for the allotment of the Blackfeet Reservation, in accordance with the allotment laws, went into effect shortly afterwards, to wit, on March 1st, 1907, but it was not in existence at the time the relinquishment was executed by the defendants and can have no bearing in the consideration of the question here presented. What the defendants actually did surrender was the right, assuming they had acquired such right by compliance with the terms of the proviso of Article V of the agreement of June 10, 1896, to select and have allotted to them the particular tract which they were then occupying. It was not a transfer or assignment, or a surrender or relinquishment of their allotment rights, but, in effect, merely a waiver to exercise that right upon a particular tract which, under the agreement of June 10, 1896, they would have been entitled to select in case the requirements upon which the accrual of such right depended had been observed, leaving the defendants, even without any reservations for that purposes, entirely free to select other lands in lieu under the allotment law whenever the same should be extended to and become operative upon the reserve. Here, however, the right to make such selection was

expressly reserved in the contract of November 5, 1906, and the agreement that the defendants, by executing the contract, which recognized and reserved to them [20] the right "to select allotments of equal area, or as provided by law, from the unoccupied lands of the Blackfeet Reservation, Montana," in the place of the land then occupied by them, was a transfer or surrender of their allotment rights, is quite conclusively met and answered by the contract itself.

I have been impelled to make these observations by the earnest contention of the able counsel for defendants, that the instruments in question amounted to a transfer or surrender of the allotment right, which they could not do, and which the Government's agent had no right to accept without authority therefor having first been conferred by appropriate legislation. That the assignment or surrender of a right to an allotment generally is, although not specifically declared by any law or statute to be void, in violation of the Government's policy with respect to the Indians, and therefore invalid, may be conceded, but I am not prepared to agree to the proposition contended for, that such would likewise be the case when the assignment or surrender is made to the United States, procured by its officers and agents, but without Congressional authority therefor having first been expressly given. Allotments of Land to Individual Indians, 20 Op. Attys. Gen'l, 42, on p. 48. That no question of that kind, however, is presented here has, I think, been sufficiently shown by what has been said. But if the contract for surrender

and the subsequent relinquishment of the right of occupancy and selection were to be given the effect contended for, and the transaction could not be upheld without Congressional authority, that requirement was met by the Act of June 21, 1906, 34 St. at L. 325, on p. 327; 1909 Supp. Fed. St. Ann., p. 208, which provides:

> "That any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under rules and regulations provided by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall [21] convey full title to the purchaser of the same as if final patent without restrictions had been issued to the allottee."

It follows that the defendants' demurrer must be overruled, and it is so ordered.

[Endorsed]: Title of Court and Cause. Memorandum Opinion. Filed June 5, 1911. Geo. W. Sproule, Clerk. [22]

And thereafter, to wit, on June 24, 1911, defendants filed their Answer herein, which is in the words and figures following, to wit: [23]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,

Defendants.

Answer.

Come now the defendants above named and for answer to the complaint herein:

I.

Deny that the said defendants Lizzie Henkel or Mamie Henkel made or executed the paper writing, of which a copy is attached to the complaint herein, marked Exhibit "A"; and,

II.

Deny that therein or thereby the said defendants agreed to relinquish all or any of their claim to all or any lands or buildings occupied by them on the said Blackfeet Indian Reservation, and aver that the same does not in any manner bind the defendants Lizzie Henkel or Mamie Henkel, and that it does not or cannot bind any of the defendants herein or operate as any relinquishment of any claim they may have to any lands within the Blackfeet Indian Reservation.

III.

Deny that on the 15th day of February, 1907, or at all, this plaintiff paid the defendants the sum of Seventy-five Hundred Dollars, or any sum, but admit that, as recited in the said instrument of which, Exhibit "B" attached to the [24] complaint is a copy, said sum was paid to the defendant Caroline Henkel, and these defendants deny that by such instrument or otherwise the said defendants relinquished to plaintiff any right, title or claim in or to any lands or buildings occupied by them on the Blackfeet Indian Reservation, or thereby or at all released the United States from any or all claims for damages to any improvements thereon.

IV.

Deny that the plaintiff became entitled by virtue of the said payment to any of the rights, titles or claims in or to any lands or buildings occupied by the defendants.

V.

Admit the averments of paragraph eight of the complaint, and deny that the plaintiff is entitled to the immediate possession of the lands described in the complaint or any of them, or that the defendants wrongfully withhold the same from the plaintiff, or that the value of the rents, uses and profits of the said premises at any time since the 5th day of February, 1907, has been of any value, but defendants aver that said premises are, and at all times since the said 5th day of February, 1907, have been of a value largely in excess of the sum of Seventy-five Hundred Dollars.

And as a further defense to the plaintiff's cause of action, the defendants aver:

I.

That the said defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel are members of the Piegan tribe of Indians; that they are and during all the times mentioned herein were members of the Piegan tribe of Indians and wards of the Government of the United States, and at all times hereinafter mentioned have resided and still continue to reside upon the Blackfeet Indian [25] Reservation in the State and District of Montana; that they are all members of one family, the above-named defendant Caroline Henkel being the mother of the defendants George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel.

II.

That more than ten years prior to the commencement of this action, the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel, and Mamie Henkel, then being members of the said Piegan tribe of Indians and wards of the Government of the United States and as such being entitled to be in and upon the said Blackfeet Indian Reservation, with the defendant Henry Henkel, the husband of the said defendant Caroline Henkel and the father of the other defendants herein, settled upon and occupied certain lands within said reservation now known and described as follows, to wit:

The East half of the Northeast quarter and the East half of the Southeast quarter of Section Twenty-eight; all of Section Twenty-seven; the West half of

the Northwest quarter and West half of Southwest quarter of Section Twenty-six; the North half of the Northeast quarter, the Southeast quarter of the Northeast quarter and the East half of the Southeast quarter of Section Thirty-three; Lots 1, 2, 3, 4, 5, 6 and 7 and the Northwest quarter of the Northwest quarter and the East half of the Northeast quarter and the East half of the Southeast quarter of Section Thirty-four, all in Township Thirty-six North, Range Fourteen West of the Montana Principal Meridian.

That all of said lands are, and at all times mentioned herein have been grazing lands and have heretofore been so classified by the plaintiff. [26]

III.

That the said premises have, ever since they were so settled upon by the defendants herein, been occupied as the home of said family and have been held by the defendants herein in common.

IV.

That since the passage of the Act approved March 4th, 1907, providing for the opening of the Blackfeet Indian Reservation, and prior to the commencement of this action, the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel selected, and each of them has selected and does hereby select, from and of the lands so by them occupied their allotments under the said Act, as follows, to wit:

The said Caroline Henkel, the East half of the Southeast quarter of Section Twenty-eight; the Southwest quarter and the West half of the Southeast quarter of Section Twenty-seven, all in Town-

ship Thirty-six North, Range Fourteen West.

The said Mamie Henkel, the East half of the Northwest quarter of Section Twenty-eight; the Northwest quarter and West half of Northeast quarter of Section Twenty-seven, all in Township Thirty-six North, Range Fourteen West.

The said Lizzie Henkel, the East half of the Northeast quarter and the East half of the Southeast quarter of Section Twenty-seven; the West half of the Northwest quarter and the West half of the Southwest quarter of Section Twenty-six, all in Township Thirty-six North, Range Fourteen West.

The said George Henkel, the north half of the Northeast quarter and the Southeast quarter of the Northeast and the East half of the Southeast quarter of Section Thirty-three; and Lots 3 and 4 and the Northwest quarter of Northwest quarter of Section Thirty-two, all in Township Thirty-six [27] North, Range Fourteen West.

The said William Henkel, Lots 1, 2, 5, 6 and 7 and the East half of the Northeast quarter and the East half of the Southeast quarter of Section Thirty-four, all in Township Thirty-six North, Range Fourteen West.

V.

Defendants further aver that each approves and acquiesces in the selection by the other of that portion of the land so occupied by them in common as is herein recited to have been selected by them respectively.

VI.

That defendants Caroline Henkel, George Henkel,

William Henkel, Lizzie Henkel and Mamie Henkel and each of them have applied to the allotting officers, who have, since the passage of the Act aforesaid, been engaged in allotting lands within the said reservation to the Indians entitled to the same under the provisions of the said Act, to allot to them lands from within the tract so as aforesaid occupied by them and to allot to each of the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel the particular lands hereinbefore recited to have been selected by them and which they hereby select respectively, but the said allotting officers have refused and declined and still refuse and decline to allot the same to the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, and that no allotment has been made to any of the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, save that under protest and insisting that they and each of them had the right to allotments from the lands so occupied by the said family as aforesaid, and to be allotted the lands hereinbefore [28] recited to have been selected by them respectively, the said William Henkel, George Henkel and Lizzie Henkel have selected lands elsewhere upon said reservation which have been allotted to them, but which they now offer to surrender and relinquish, and to take in lieu thereof the lands by them selected as hereinbefore set forth.

VII.

The defendants, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel

further aver that the said allotting officers refuse and decline to make allotments to the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel from said lands so as aforesaid occupied by them for the following, among other reasons, namely:

That heretofore on or about the 5th day of November, 1906, the said Caroline Henkel George Henkel and William Henkel signed a letter addressed to the Commissioner of Indian Affairs at Washington, D. C., a copy of which is attached to the complaint and marked Exhibit "A"; that thereafter on or about the 15th day of February, 1907, there was paid to the said Caroline Henkel, with the approval of the Secretary of the Interior, the said sum of Seventy-five Hundred Dollars, and thereupon there was executed by the said defendants Caroline Henkel, George Henkel and William Henkel a receipt, a copy of which is attached to the complaint and marked Exhibit "B."

VIII.

And now the plaintiff avers that by reason of said instruments and the transaction recited by them, the defendants Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel have relinquished their right [29] to select any of said lands or to have the same allotted to them.

LX.

And defendant Caroline Henkel avers that she is ready and willing to return, to whomsoever may be entitled to the same, the said sum of Seventy-five Hundred Dollars, together with interest thereon at

the legal rate, and now hereby offers to pay the same into court for the use of the plaintiff, and she avers that all the proceedings recited by the said letter and the said receipt are null and void, and that none of the acts done as therein recited can or should operate in any manner as a relinquishment of any right on the part of the defendants to select any portion of the lands so as aforesaid occupied by them.

WHEREFORE, defendants demand judgment that the complaint of the plaintiff be dismissed with costs.

WALSH & NOLAN,
Attorneys for Defendants. [30]

State of Montana,
County of Lewis and Clark,—ss.

T. J. Walsh, being duly sworn, deposes and says that he is one of the attorneys for the defendants above named; that the foregoing answer is true to his best knowledge, information and belief; that this verification is not made by one of the defendants because none of them is or resides within the County of Lewis and Clark where the affiant is and resides.

T. J. WALSH.

Subscribed and sworn to before me this 17th day of June, 1911.

[Notarial Seal] C. B. NOLAN,
Notary Public for the State of Montana, Residing at Helena.

My commission expires Dec. 9, 1913.

Due personal service of the within answer made

and admitted and receipt of copy acknowledged this 23d day of June, 1911.

J. W. FREEMAN,
Attorney for Plaintiff.

[Endorsed]: Title of Court and Cause. Answer. Filed June 24, 1911. Geo. W. Sproule, Clerk. [31]

And thereafter, on September 5, 1911, Demurrer to the Answer was duly filed herein, being in the words and figures following, to wit: [32]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, LISSIE HENKEL and MAMIE HENKEL,
Defendants.

Demurrer to Answer.

Now comes the above-named plaintiff and demurs to defendants' second and further defense for the reason that the same does not state facts sufficient to constitute a defense, or any defense.

J. W. FREEMAN,
United States Attorney, District of Montana.

Due service of the demurrer in the above-entitled action and receipt of a true copy thereof are hereby acknowledged and admitted this 5th day of September, 1911.

WALSH & NOLAN,
Attorneys for Defendants.

[Endorsed]: Title of Court and Cause. Demurrer. Filed Sept. 5, 1911. Geo. W. Sproule, Clerk. [33]

And thereafter, to wit, on October 13, 1911, the Memorandum Opinion of the Court was duly filed herein, which is in the words and figures following, to wit: [34]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 1057.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL et al.,

Defendants.

No. 1062.

CAROLINE HENKEL et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Memorandum Opinion [on Demurrer to Answer].

My views as to the validity of the instruments involved in the above-entitled causes, whereby the Henkels, in consideration of the payment of $7,500, relinquished and surrendered to the United States their right to select as allotments certain lands upon the Blackfoot Indian Reservation, are fully stated in the memorandum opinion upon the defendants' de-

murrer to plaintiff's complaint in case No. 1057, United States vs. Henkel et al. The question there discussed is again presented by the plaintiff's demurrer to the affirmative matter set up in defendants' answer in case No. 1057, and by the defendant's demurrer to the plaintiffs' complaint in case No. 1062. Upon reargument of the questions involved it was insisted that the main point upon which reliance was placed in the attack upon the legality of the transaction [35] whereby it is contended on behalf of the Government that a relinquishment of the right to select the lands in controversy as allotments was effected, viz., the want of power and capacity of the parties attempting to relinquish, and the want of authority of the United States, acting through its officers and agents, to receive and accept such surrender or relinquishment of the allotment right, was lost sight of, or, at least, did not receive the consideration which it deserved. In that connection it is contended that the Act of June 21, 1906, 34 St. at L. 325, does not confer authority upon the General Government to secure from the Indians a relinquishment of their allotment rights, but that it is confined to allotments which have been made and to which the limitations upon the power of alienation has attached, and which are or can be incorporated within a reclamation project and made available for the purpose of reclamation. It seems to me, however, that a construction of the Act confining its operation within so narrow limits is not warranted. But if we apply the same argument which the learned counsel makes use of in the consideration of

the meaning and effect of the Act of June 21, 1906, to the Act which restricts the power of alienation with respect to allotted lands, the inhibitions could not possibly apply to the surrender or alienation of the mere right to select an allotment inasmuch as the statute is by its terms limited to allotments which have been made. The restrictions upon the power of alienation of allotted lands were imposed to protect the allottee "from the greed and superior intelligence of the white man," (Beck vs. Flournoy Live Stock and Real Estate Co., 65 Fed. 30), but the right of one Indian to surrender and relinquish his preference right to an allotment of a particular tract of land to another Indian has been expressly recognized. Williams vs. First National Bank, 216 U. S. 582; Hy-Yu-Tse-Mil-Kin vs. Smith, 194 U. S. 401. If this preference right of allotment [36] may be relinquished by one Indian in favor of another there would seem to be no reason why the same right may not be surrendered to the General Government. There is certainly no law or statute which forbids it.

The demurrer of the plaintiff to the affirmative matter set up in defendants' answer in case No. 1057, United States vs. Henkel et al., and the demurrer of the defendant to the complaint in case No. 1062, Henkel et al. vs. United States, will therefore be sustained, and an order may be entered accordingly.

[Endorsed]: Title of Court and Cause. Memorandum Opinion. Filed Oct. 13, 1911. Geo. W. Sproule, Clerk. [37]

And thereafter, to wit, on October 13, 1911, an Order Sustaining the Demurrer was duly made and entered herein in the words and figures following, to wit:

[Order Sustaining Demurrer to Answer.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 1057.

UNITED STATES

vs.

HENRY HENKEL et al.

This cause, heretofore submitted to the Court upon plaintiff's demurrer to the affirmative matter set up in defendants' answer, came on regularly at this time for the judgment and decision of the Court, and, after due consideration, it is ordered that said demurrer be and the same hereby is sustained; exception of defendants noted.

Entered, in open court, October 13, 1911.

GEO. W. SPROULE,
Clerk. [38]

And thereafter, to wit, on December 22, 1911, Judgment was duly rendered and entered herein in the words and figures following, to wit: [39]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, LIZZIE HENKEL and MAMIE HENKEL, GEORGE HENKEL and WILLIAM HENKEL,

Defendants.

Judgment.

BE IT REMEMBERED that this cause came on for hearing on the 2d day of October, A. D. 1911, on plaintiff's demurrer to defendants' answer on file herein, James W. Freeman, United States Attorney for the District of Montana, appearing on behalf of said plaintiff, and Messrs. Walsh & Nolan appearing on behalf of said defendants; and thereupon said demurrer was argued and submitted to the Court; and thereafter, to wit, on the 13th day of October, A. D. 1911, the Court, being fully advised in the premises, sustained said demurrer, and the said defendants elected to stand upon their answer and then and there refused to plead further to said complaint.

The Court being now fully advised in the premises and it further appearing that the said plaintiff is entitled to the relief demanded in said complaint and ought to recover from the said defendants the possession of the premises described in plaintiff's complaint;

NOW, THEREFORE, the premises considered, on motion of James W. Freeman, United States Attorney for the District of Montana,

It is hereby CONSIDERED, ORDERED and ADJUDGED by the Court that the said plaintiff, the United States of America, have and [40] recover from the said defendants the possession of the premises aforesaid, according to the description thereof contained in said complaint, and as are more particularly described as follows, to wit: all those lands within the boundaries off the red lines as the same appear on the plat marked Exhibit "A" attached and made a part hereof and to have execution therefor; and

It is further ORDERED and ADJUDGED that the said plaintiff have and recover from said defendants its costs of this suit taxed at ——— dollars.

Judgment rendered and entered this 22d day of December, 1911.

WILLIAM H. HUNT,
Circuit Judge. [41]

MAPS TOO LARGE FOR FILMING

[Endorsed]: Title of Court and Cause. Judgment. Filed and entered December 22, 1911. Geo. W. Sproule, Clerk.

And thereafter, to wit, on December 23, 1911, Petition for Writ of Error was duly filed herein, being in the words and figures following, to wit:

[43]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,

Defendants.

Petition for Writ of Error.

The above-named defendants, Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, feeling aggrieved by the judgment of this Court, made and entered in the above-entitled action on the 22d day of December, 1911, in favor of the plaintiff and against the defendants, for the possession of the premises described in the complaint herein, together with plaintiff's costs and disbursements incurred in said action, come now, by Thomas J. Walsh and Cornelius B. Nolan, their attorneys, and petition the Court for an order allowing the said defendants to prosecute a writ of error

to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also ask that an order be made fixing the amount of security the defendants shall give and furnish upon the said writ of error.

WALSH & NOLAN,
Attorneys for Defendants.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error. Filed Dec. 23, 1911. Geo. W. Sproule, Clerk. [44]

And thereafter, on December 23, 1911, defendants filed their Assignment of Errors herein, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,
Defendants.

Assignment of Errors.

The defendants in this action, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occured in this cause, to wit:

I.

The Court erred in overruling the demurrer of the defendants to the complaint herein.

II.

The Court erred in sustaining the demurrer of the plaintiff to the separate defense set up in the answer of the defendants.

III.

The Court erred in ordering judgment herein on the pleadings in favor of the plaintiff and against the defendants.

IV.

The Court erred in entering judgment herein in favor of the plaintiff and against the defendants.

WHEREFORE, the said defendants, Henry Henkel, Caroline [45] Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, pray that the said judgment of the said Circuit Court of the United States for the District of Montana be reversed.

WALSH & NOLAN,
Attorneys for Defendants.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Dec. 23, 1911. Geo. W. Sproule, Clerk.

And thereafter, on December 23, 1911, an Order Allowing Writ of Error was duly filed and entered herein in the words and figures following, to wit: [46]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,

Defendants.

Order Allowing Writ of Error.

At a stated term, to wit, November Term, 1911, of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, held at the courtroom in the city of Helena, State of Montana, on the 23d day of December, 1911, upon motion of Thomas J. Walsh, Esq., one of the attorneys for the defendants, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and is hereby allowed for a review in the United States Circuit Court of Appeals, for the Ninth Circuit, of the judgment heretofore entered in this cause, and that the amount of the bond on said writ be, and the same is, hereby fixed at the sum of Three Hundred Dollars.

WILLIAM H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Title of Court and Cause. Order Allowing Writ of Error. Filed and entered December 23, 1911. Geo. W. Sproule, Clerk. [47]

And thereafter to wit, on December 23, 1911, Bond on Writ of Error was duly filed herein, being in the words and figures following, to wit: [48]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, and MAMIE HENKEL,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, as principales, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, as surety, are held and firmly bound unto United States of America, the plaintiff above named, in the sum of Three Hundred Dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our successors or assigns, firmly by these presents.

Sealed with our seals, and dated this 23d day of December, 1911.

WHEREAS, the above-named defendants, Henry Henkel, Caroline Henkel, George Henkel, William

Henkel, Lizzie Henkel and Mamie Henkel, have sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled action, by the Circuit Court of the United States for the District of Montana:

NOW, THEREFORE, the condition of this obligation is such that if the above-named Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel shall prosecute said [49] writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

HENRY HENKEL,
CAROLINE HENKEL,
GEORGE HENKEL,
WILLIAM HENKEL,
LIZZIE HENKEL and
MAMIE HENKEL.
By WALSH & NOLAN,
Their Attorneys.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By EDW. C. MURRAY,
Attorney in Fact.
Attest: A. J. HORSKY,
Attorney in Fact.

[Corporate Seal]

The foregoing bond and surety approved this 23d day of December, 1911.

WILLIAM H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Title of Court and Cause. Bond on Writ of Error, Filed Dec. 23, 1911. Geo. W. Sproule, Clerk. [50]

And thereafter, to wit, on December 23, 1911, a Writ of Error was duly issued herein, which is hereto annexed and is in the words and figures following, to wit: [51]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, and MAMIE HENKEL,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable Judges of the Circuit Court of the United States, for the Ninth Circuit, District of Montana.

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Circuit Court, before you, or some of you, between United States of America, plaintiff, and Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, defendants, a manifest error hath happened, to the great damage of the said defendants and plaintiffs in error,

Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 23d day [52] of January, 1912, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 23d day of December, in the year of our Lord, 1911.

[Seal] GEO. W. SPROULE,
Clerk of the United States Circuit Court, for the Ninth Circuit.

The above writ of error is hereby allowed by
WILLIAM H. HUNT,
U. S. Circuit Judge.

Service accepted Dec. 23, 1911.
J. W. FREEMAN,
U. S. Attorney. [53]

Answer of Court to Writ of Error.

The answer of the Honorable, the Circuit Judges of the United States, Ninth Circuit, in and for the District of Montana, to the foregoing Writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said Circuit Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, in a certain schedule to this writ annexed, as within I am commanded.

By the Court,

[Seal] GEO. W. SPROULE,
Clerk. [54]

Due personal service of within Writ of Error made and admitted and receipt of copy acknowledged this 23d day of December, 1911.

J. W. FREEMAN,
U. S. Attorney, Attorney for Plaintiff.

[Endorsed]: No. 1057. In U. S. Circuit Court, Ninth Circuit, District of Montana. United States of America, Plaintiff, vs. Henry Henkel et al., Defendants. Writ of Error. Filed Dec. 23d, 1911. Geo. W. Sproule, Clerk. [55]

And thereafter, to wit, on December 23, 1911, a Citation was duly issued herein, which is hereto annexed and is in the words and figures following, to wit: [56]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL and MAMIE HENKEL,

Defendants.

Citation.

United States of America,—ss.

To United States of America, Plaintiff and Defendant in Error, and to James W. Freeman, United States District Attorney, its Attorney, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Montana, wherein Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel are plaintiffs in error, and United States of America is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, United States Circuit Judge, presiding in the Circuit Court of the United States for the District of Montana, this 23d day of December, 1911, and of the Independence of the United States the one hundred and thirty-fifth.

WILLIAM H. HUNT,
U. S. Circuit Judge. [57]

Due personal service of within citation made and admitted and receipt of copy acknowledged this 23d day of December, 1911.

J. W. FREEMAN,
U. S. Attorney,
Attorney for Plaintiff.

[Endorsed]: No. 1057. In U. S. Circuit Court, Ninth Circuit, District of Montana. United States of America, Plaintiff, vs. Henry Henkel et al., Defendants. Citation. Filed Dec. 23d, 1911. Geo. W. Sproule, Clerk. [58]

Certificate of Clerk U. S. Circuit Court to Transcript of Record, etc.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 59 pages, numbered consecutively from 1 to 59, inclusive, is a true and correct transcript of the pleadings, process, orders and judgment, and all proceedings

had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-three 20/100 Dollars ($43.20), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Helena, Montana, this 26th day of December, A. D. 1911.

[Seal] GEO. W. SPROULE,
Clerk. [59]

[Endorsed]: No. 2094. United States Circuit Court of Appeals for the Ninth Circuit. Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court of the District of Montana.

Received December 29, 1911.

F. D. MONCKTON,
Clerk.

Filed December 30, 1911.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to-wit, the October Term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Fifth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

No. 2094.

HENRY HENKEL et al., Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. T. J. Walsh, counsel for the plaintiffs in error, and by Mr. United States Attorney James W. Freeman, counsel for the defendant in error, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

[*Opinion U. S. Circuit Court of Appeals.*]

Walsh & Nolan and T. J. Walsh, for the Plaintiffs in Error.
Jas. W. Freeman, United States Attorney, for the Defendant in Error.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

The United States brought an action against the plaintiffs in error to recover the possession of about 800 acres of land of the Blackfeet Indian Reservation, in Montana. The complaint alleged that prior to November 5, 1906, the United States, pursuant to the Reclamation Act (32 Stat. 388) made surveys for the Milk River Irrigation Project, in the northern part of Montana, and that the lands described in the complaint were necessary for flowage and construction purposes in connection with said project; that the plaintiffs in error prior to that date settled on and occupied the said land by virtue of their being wards of the Government and members of the Piegan tribe of Indians, with the exception of Henry Henkel, a white man, the husband of Caroline Henkel and the father of the other parties defendant to the action, all of whom resided together on the reservation; that on November 5, 1906, Caroline Henkel, for herself and her two daughters, together with George and William Henkel, made a written proposition to the Commissioner of Indian Affairs to relinquish to the United States all claim to the lands then occupied by them, being the lands described in the complaint and all buildings thereon, for the sum of $7500., reserving to themselves the right to select their allotments of equal area as provided by law, from the unoccupied lands of the said reservation; that Henry Henkel, as head of the family, approved said proposition; that on February 15, 1907, the proposition was approved and accepted by the Secretary of the Interior, who paid to Caroline Henkel the said sum of $7500.00; that thereupon she, for herself and her two daughters, signed a receipt for said sum, and a relinquishment of all their rights to the land occupied by them, and said receipt was also signed by George and William Henkel, and approved by Henry Henkel. The defendants to the action demurred to the complaint on the ground that the court had no jurisdiction, and that the complaint did not state facts sufficient to constitute a cause of action. The de-

murrer was overruled, and the defendants filed their answer in which they alleged that they, with the exception of Henry Henkel, were members of the Piegan tribe of Indians and wards of the Government, residing upon the reservation, and that for more than ten years before the commencement of the action they had, with Henry Henkel, resided thereon, and on the lands described in the complaint; that since the passage of the Act of March 1, 1907 (34 Stat. 1035), providing for the opening of the said reservation they have —, and do select from the lands occupied by them, certain lands as the allotment for each, describing the same by their legal subdivisions; that under the provisions of such Act, they are entitled to have the same allotted to them, but that the allotting officers have refused and declined to allot the same to them; that under protest, George, William and Lizzie Henkel have selected lands elsewhere upon said reservation which have been allotted to them, but which they offer to relinquish and to take in lieu thereof the lands by them first selected; that Caroline Henkel is ready and willing to return the sum of $7500. to whomsoever may be entitled to the same. with legal interest thereon, and offers to pay the same into the court for the use of the plaintiff. The defendant in error filed a demurrer to the matter so pleaded in the answer on the ground that the same does not state facts sufficient to constitute a defense. The demurrer was sustained and thereafter judgment on the pleadings was rendered for the defendant in error.

GILBERT, *Circuit Judge*, after stating the case:

It is contended that the instruments signed by and on behalf of the plaintiffs in error are void for want of capacity on their part to make such disposition of their right to select the lands in controversy as their allotments, and for want of capacity on the part of the officers of the Government, charged with the execution of the reclamation law, to acquire such lands or any lands within an Indian reservation, or to devote any of such lands to reclamation purposes. The reclamation project, for the construction of which the land in controversy is sought to be used by the United States, is a project for the irrigation of lands at a distance from the Blackfeet Indian Reservation, and the lands in controversy are intended to be occupied for a dam and storage reservoir. By the agreement between the United States and the Blackfeet Indians, of September 26, 1895, it was provided in Article 5 that during the existence of the agreement no allotments of land in severalty should be made to the Indians, but that the whole reservation should be considered to be held by them as a communal grazing tract, but it was provided "that any member of the tribe may, with the approval of the agent in charge, fence any such area of land as he and the members of his family would be entitled to under the Allotment Act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give said members of the tribe the right to take such lands when allotments of the land in severalty shall be made." Article 7 pro-

vides that whenever, in the opinion of the President, the public interests require the construction of railroads or other highways, telegraph or telephone lines, canals or irrigation ditches, through any portion of the reservation, a right of way shall be "and is hereby granted for such purposes, under such rules, regulations, limitations and restrictions as the Secretary of the Interior may prescribe, the compensation to be fixed by said Secretary, and by him expended for the benefit of the Indians."

There is no allegation in the pleadings that the plaintiffs in error at any time filed with the agent of the reservation a description of the land occupied by them, or of their improvements thereon. The plaintiffs in error did not relinquish their allotment right, but merely their preference right to select for their allotment the particular tract of land on which they resided. In Williams v. First National Bank, 216 U. S. 582, the court recognized the right of one Indian to surrender and relinquish to another Indian his preference right to an allotment of a tract of land. The court quoted with approval the language of the United States Court of Appeals of the Indian Territory, in which it was said: "The statute did not intend that an Indian should be compelled to take his allotment on the land then held by him. He could sell his improvements and holdings to another Indian for Allotment, and lay his own on other land which he might find vacant, or which he might, in turn, purchase from another Indian." It being established that an Indian on a a reservation may relinquish his preference right to allotment to another Indian, it follows as a matter of course, and with stronger reason, that he may relinquish to the United States. It was only to prevent sales and transfers to other persons, that restrictions were placed upon the power of Indians to alienate their lands or convey their rights of possession. There is no restriction on their right to sell or relinquish to the United States. Title to lands occupied by the Indians, whether on reservations or otherwise, has always been recognized as being in the United States. In Lykins v. McGrath, 184 U. S. 169, referring to the purpose of imposing restrictions on the Indian's power of conveyance, the court said that it was "in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein." In Jones v. Meehan, 175 U. S. 1-8, the Court said: "Undoubtedly the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only. The ultimate title in fee in those lands was in the United States, and the Indian title could not be conveyed by the Indians to any one but the United States without the consent of the United States."

Nor do we think there can be any doubt that the officers of the United States who conducted the negotiations and received the relinquishment and paid for the same acted within the scope of their authority. The Commissioner of Indian Affairs having management of all matters arising out of Indian relations, and charged with

the duty of safe-guarding the Indian's rights, acted under the direction of the Secretary of the Interior as required by law. By Section 7 of the Reclamation Act, it is provided that whenever, in carrying out the provisions of the act it should become necessary to acquire any rights or property "the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase *of* condemnation," etc. Under the authority of that Act the relinquishment was obtained.

We find no error. The judgment is affirmed.

[Endorsed:] Opinion. Filed May 6, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Montana.

Judgment U. S. Circuit Court of Appeals.

This Cause came on to be heard on the Transcript of the Record from the Circuit Court of the United States for the District of Montana and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and hereby is affirmed.

[Endorsed:] Judgment. Filed and Entered May 6, 1912. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Petition for and Order Allowing Writ of Error from Supreme Court U. S. and Fixing Amount of Bond on Writ of Error.

The above named plaintiffs in error Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie

Henkel, feeling themselves aggrieved by the judgment of this Court, made and entered in the above entitled action on the 6th day of May, 1912, in the above entitled cause, affirming the judgment of the United States Circuit Court, Ninth Circuit, in and for the District of Montana, in favor of the defendant in error against the plaintiffs in error for the possession of the premises described in the complaint herein, together with its costs and disbursements incurred in said action, come now, by Thomas J. Walsh, Esq., and Cornelius B. Nolan, Esq., their attorneys, and pray the Court for a writ of error to the United States Supreme Court in said cause, and that the transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said Supreme Court of the United States; and also pray that an order be made fixing the amount of security the plaintiffs in error shall give and furnish upon the said writ of error.

(Signed) THOMAS J. WALSH.
(Signed) CORNELIUS B. NOLAN,
Attorneys for Plaintiffs in Error.

The writ of error as prayed for in the foregoing petition is hereby granted, and the amount of the bond on said writ is hereby fixed in the sum of Three Hundred Dollars ($300.00).

Dated this 11th day of February, A. D. 1913.

(Signed) WM. B. GILBERT, *Judge.*

[Endorsed:] Petition for and order allowing writ of error from Supreme Court U. S. and fixing amount of bond on writ of error. Filed Feb. 11, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Assignment of Errors.

Now come the above named plaintiffs in error, Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, by Thomas J. Walsh, Esq., and C. B. Nolan, Esq., their attorneys, and say that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, erred in overruling the demurrer of the plaintiffs in error to the complaint herein.

II.

Said Court erred in sustaining the demurrer of the defendant in error to the separate defense set up in the answer of the plaintiffs in error.

III.

Said Court erred in ordering judgment herein on the pleadings in favor of the defendant in error and against the plaintiffs in error.

IV.

Said Court erred in entering judgment herein in favor of the defendant in error and against the plaintiffs in error.

V.

The United States Circuit Court of Appeals, Ninth Circuit, erred in affirming the judgment of said Circuit Court in favor of the defendant in error and against the plaintiffs in error.

Wherefore, the said plaintiffs in error, Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel, and Mamie Henkel, pray that the judgment of said Circuit Court of Appeals, Ninth Circuit, be reversed.

(Signed) THOMAS J. WALSH,
(Signed) C. B. NOLAN,
Attorneys for Plaintiffs in Error.

[Endorsed:] Assignment of errors. Filed Feb. 11, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Bond on Writ of Error from Supreme Court U. S.

Know all men by these presents: That, Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel, and Mamie Henkel, as principals, and the Massachusetts Bonding & Insurance Company, as surety, are held and firmly bound unto United States of America, the defendant in error above named, in the sum of Three Hundred Dollars ($300.00), to be paid to the said United States of America, which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our successors or assigns, firmly by these presents.

Sealed with our seals, and dated this 6th day of February, 1913.

Whereas, the above named plaintiffs in error Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel, and Mamie Henkel have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment of the United States Circuit Court of Appeals, Ninth Circuit, made and entered on the 6th day of May, 1912:

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) HENRY HENKEL,
(Signed) CAROLINE HENKEL,
(Signed) GEORGE HENKEL,
(Signed) WILLIAM HENKEL,
(Signed) LIZZIE HENKEL,
(Signed) MAMIE HENKEL,
(Signed) By WALSH & NOLAN, *Their Attorneys.*
MASSACHUSETTS BONDING AND INSURANCE COMPANY,
(Signed) By EDWARD C. MURRAY,
[SEAL.] *Attorney in Fact.*

Attest:
(Signed) A. J. HORSKY, *Attorney in Fact.*

The foregoing bond and surety approved this 11th day of February, 1913.
(Signed) WM. B. GILBERT, *Judge.*

[Endorsed:] Bond on writ of error from Supreme Court U. S. Filed Feb. 11, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Præcipe for Transcript of Record on Writ of Error from Supreme Court U. S.

To the Clerk of the Above Entitled Court:

You will please prepare Transcript of the Record in this cause, to be filed in the office of the Clerk of the Supreme Court of the

United States under the appeal heretofore perfected to said court, and include in said Transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Demurrer to Complaint.
3. Order overruling Demurrer to Complaint.
4. Memorandum opinion on Demurrer to Complaint.
5. Answer.
6. Demurrer to Answer.
7. Memorandum opinion on Demurrer to Answer.
8. Order sustaining Demurrer to Answer.
9. Judgment.
10. Copy of opinion in United States Circuit Court of Appeals affirming judgment of the United States Circuit Court for the Ninth Circuit.
11. Petition for Writ of Error.
12. Writ of Error.
13. Citation.
14. Bond on Writ of Error.
15. Order allowing Writ of Error.
16. Assignment of Errors.
17. Answer of Court to Writ of Error.
18. Præcipe indicating portions of Record to be incorporated in Transcript.
19. Certificate of Clerk of the United States Circuit Court of Appeals to Transcript of Record.

Said Transcript to be prepared as required by law and the rules of said United States Supreme Court.

(Signed) THOMAS J. WALSH,
(Signed) CORNELIUS B. NOLAN,
Attorneys for Plaintiffs in Error.

Service of the foregoing Præcipe for Transcript and receipt of a true copy admitted this 14th day of February, 1913.

(Signed) JAS. W. FREEMAN,
U. S. Attorney.

[Endorsed:] Præcipe for transcript of record on writ of error from Supreme Court U. S. Filed Feb. 19, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2094.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-six (66) pages, numbered from and including one (1) to and including sixty-six (66) to be a true copy of the complete record in the above-entitled cause, prepared pursuant to Præcipe therefor filed by counsel for the Plaintiffs in Error, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on return to the annexed Writ of Error from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of February, A. D. 1913.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

In the United States Circuit Court of Appeals, Ninth Circuit.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss.*:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals, Ninth Circuit:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said United States Circuit Court of Appeals, before you, or some of you, between Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel, Plaintiffs in Error, against the United States of America, Defendant in Error, a manifest error hath happened, to the

great damage of said plaintiffs in error, Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceeding aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the City of Washington, D. C., on the 12th day of April, 1913, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 11th day of February, in the year of our Lord, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

The above Writ of Error is hereby allowed by

WM. B. GILBERT,
U. S. Circuit Judge.

Service of the foregoing Writ of Error and receipt of a true copy admitted this 14th day of Feb. 1913.

JAS. W. FREEMAN,
U. S. Attorney.

[Endorsed:] No. 2094. Docketed. United States Circuit Court of Appeals, Ninth Circuit. Henry Henkel et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Feb. 19, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals, Ninth Circuit.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM Henkel, Lizzie Henkel, and Mamie Henkel, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Plaintiff and Defendant in Error, and to James W. Freeman, Esq., United States District Attorney, its Attorney, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be held in the City of Washington, D. C., within sixty (60) days from the date of this citation, pursuant to writ of error filed in the Clerk's office of the United States Circuit Court of Appeals, for the Ninth Circuit, wherein Henry Henkel, Caroline Henkel, George Henkel, William Henkel, Lizzie Henkel and Mamie Henkel are plaintiffs in error, and United States of America is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert one of the Judges of the United States Circuit Court of Appeals, Ninth Circuit, this 11th day of February, 1913, and of the Independence of the United States the one hundred and thirty-seventh.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

Service of the foregoing Citation and receipt of a true copy admitted this 14th day of Feb. 1913.

JAS. W. FREEMAN,
U. S. Attorney.

[Endorsed:] No. 2094. Docketed. United States Circuit Court of Appeals, Ninth Circuit. Henry Henkel et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation. Filed Feb. 19, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 23,618. U. S. Circuit Court Appeals, 9th Circuit. Term No. 1,043. Henry Henkel, Caroline Henkel, George Henkel, et al., plaintiffs in error, vs. The United States. Filed April 5th, 1913. File No. 23,618.

FILED
OCT 29 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 142.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, AND MAMIE HENKEL, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFFS IN ERROR.

WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs in Error.

THOMAS J. WALSH,
Counsel for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 142.

HENRY HENKEL, CAROLINE HENKEL, GEORGE HENKEL, WILLIAM HENKEL, LIZZIE HENKEL, AND MAMIE HENKEL, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFFS IN ERROR.

I.

Statement of Facts.

This action was brought by the United States of America as plaintiff against the parties named as plaintiffs in error above to oust and eject them from certain lands within the Blackfeet Indian Reservation occupied by them. The complaint discloses that they are all save Henry Henkel members of the Piegan tribe of Indians, and as such had settled upon and were entitled, at all times prior to February 15, 1907, to occupy and possess the lands in question. Henry Henkel is the husband of Caroline Henkel, and

the other plaintiffs in error are their children. They all constitute one family and occupied the lands as such. In the month of November, 1906, while they were in possession of the lands in question, occupying them by permission of the defendant in error, with their buildings and improvements thereon, Caroline Henkel, professing to act for and on behalf of herself and her two daughters above named, and her two sons, George Henkel and William Henkel, executed an instrument as follows:

"BABB, MONTANA, November 5, 1906.

"*Commissioner of Indian Affairs,*
Washington, D. C.

"SIR: I, Caroline Henkel, for myself and two daughters, Lizzie and Mamie Henkel, and we, George and William Henkel, respectively, members of the Piegan tribe of Indians, hereby agree to relinquish all claims to all lands and all buildings now occupied by us on the Blackfeet Indian Reservation, Montana, and comprising about 800 acres. These lands are situated at the foot of Lower St. Mary Lake and south of Swift Current Creek.

"The conditions of our surrender of such lands to the Government for use in connection with the proposed St. Mary Reservoir of the U. S. Reclamation Service, are that we shall be paid the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00)—in cash for the improvements on such selections and that we may subsequently be allowed to select allotments of equal area, or as provided by law, from the unoccupied lands of the Blackfeet Reservation, Montana.

"Very respectfully,

her
"CAROLINE x HENKEL.
mark
"GEORGE HENKEL.
"WILLIAM HENKEL.

"Witnesses:
"C. T. PRALL.
"CYRUS C. BABB

"I, Henry Henkel, husband of the above Caroline Henkel and father of Lizzie, Mamie, George and William Henkel, hereby concur in all of the provisions of the foregoing agreement.

"Very respectfully,

"HENRY HENKEL.

"Witnesses:

"C. T. PRALL.

"CYRUS C. BABB."

On the 15th of February following, the price mentioned in the foregoing instrument was paid and a receipt taken for the same as follows:

"BABB, MONTANA, February 15, 1907.

"In consideration of the sum of seven thousand five hundred dollars ($7,500), to Caroline Henkel in hand paid, the receipt of which is hereby acknowledged, I, Caroline Henkel, for myself and my two daughters, Lizzie and Mamie Henkel, and we, George and William Henkel, hereby relinquish to the United States all our rights, titles and claims in or to all lands and buildings now occupied by us on the Blackfeet Indian Reservation, Montana, and located at the foot of Lower St. Mary Lake and south of Swift Current Creek, and also do hereby release the United States from all claims for damages to all improvements of whatsoever nature thereon.

"CAROLINE her x mark HENKEL.

"GEORGE HENKEL.

"WILLIAM HENKEL.

"Witnesses:

"E. L. HENDRIX.

"ELMO A. BROWN.

"I, Henry Henkel, husband of the above Caroline Henkel, and father of Lizzie, Mamie, George, and William Henkel, hereby concur in all the provisions of the foregoing agreement.

"HENRY HENKEL.

"Approved:

"CYRUS C. BABB,

"District Engineer."

The complaint further averred that pursuant to an act of Congress approved June 17, 1902, the Government had made investigations of and surveys for an irrigation project known as the Milk River Irrigation Project, under which lands in the northern part of the State of Montana were to be irrigated, and that among other works forming part of the system to be established a dam was to be constructed at the foot of the Lower St. Mary's Lake, by which the lands in question herein would be flooded, and that the same were necessary for flooding in connection with the project referred to.

Record, p. 2.

A general demurrer to the complaint was overruled.

Record, p. 14.

The plaintiffs in error answered, admitting the execution of the instrument referred to in the complaint and the payment of the money as recited in the receipt, but denied the legal effect claimed for them. As a separate defense they averred the membership of all of them, save Henry Henkel, in the Piegan tribe of Indians and their right as such to be upon the Blackfeet Indian Reservation; that more than ten years before the commencement of the action they settled upon certain lands within the reservation which, since a recent survey, are designated by congressional subdivisions, embracing the lands mentioned in the complaint; that ever since their settlement upon such lands they had occupied the same in common as their home, and that since the passage of the act of March 4, 1907, opening the reservation to settlement, they had selected, and by their answer select, such lands as their allotments under this act, the lands being grazing in character, the selection of each of the plaintiffs in error entitled to allotments being set out and each acquiescing in the selection made by the other. It is then averred that the allotting officers have refused and refuse to allot the lands in question to them, but that under protest William

Henkel, George Henkel, and Lizzie Henkel had been allotted lands elsewhere, which they offered to surrender if the lands selected by them should be allotted to them, the refusal being based upon the instruments referred to in the complaint.

The answer further averred that the lands were at all times since the execution of the instruments mentioned, worth much more than the price paid, which the plaintiffs in error offered to return.

Record, pp. 21-28.

A demurrer to the answer was sustained by the court, and, the plaintiffs in error electing to stand upon it, judgment was awarded for the possession of the premises.

Record, p. 34.

The cause was taken to the Circuit Court of Appeals, Ninth Circuit, by which court the judgment was affirmed (Record, pp. 50-53), and it is now before this court by writ of error to review the judgment of affirmance. Praying a reversal, the plaintiffs in error make the following:

II.

Assignment of Errors.

I.

The Circuit Court of the United States, Ninth Circuit, in and for the District of Montana erred in overruling the demurrer of the plaintiffs in error to the complaint herein.

II.

Said court erred in sustaining the demurrer of the defendant in error to the separate defense set up in the answer of the plaintiffs in error.

III.

Said court erred in ordering judgment herein on the pleading in favor of the defendant in error and against the plaintiffs in error.

IV.

Said court erred in entering judgment herein in favor of the defendant in error and against the plaintiffs in error.

V.

The United States Circuit Court of Appeals, Ninth Circuit, erred in affirming the judgment of said circuit court in favor of the defendant in error and against the plaintiffs in error.

III.

ARGUMENT.

The rights of the parties depend upon the validity and efficacy of the writings referred to in the complaint as a relinquishment of the right to have the lands referred to in them allotted to the Indian plaintiffs in error.

It is insisted that they are void for want of capacity on the part of the Indians to make any disposition, such as the instruments contemplate, of their right to select the lands in question as their allotments when it should become perfect, and as well for total want of capacity on the part of the officers of the Government charged with the execution of the reclamation law, to acquire any lands or rights to lands within an Indian reservation for utilization in connection with any project of irrigation, without its bounds, or to devote any such lands to such purpose. The disqualification rests upon the parties on both sides of the supposed contract.

1. As to the Capacity of Indians to Relinquish Allotment Rights.

When the agreements in question were entered into the act opening the Blackfeet Reservation had not yet passed. But the policy of allotting lands in severalty to the Indians was one to which the National Government had given adherence, at least since the passage of the Dawes act in 1887. At the time referred to the act of February 28, 1891, was in force. It empowered the President to cause to be surveyed any Indian reservation and to allot to each Indian 160 acres of land valuable for grazing only.

3 Fed. Stat. Ann., 499.

It was provided by the Dawes act, of which the act last above referred to was an amendment, that all allotments set apart under its provisions should be selected by the Indians themselves, respectively, and in such manner as to embrace the improvements of the Indians making the selection.

3 Fed. Stat. Ann., 493.
Hy-Yu-Tse-Mil-Kin *vs.* Smith, 119 Fed., 114.
Hy-Yu-Tse-Mil-Kin *vs.* Smith, 194 U. S., 401-414.

It had been held by this court that this act gave a priority of right to the Indians occupying any portion of a reservation to select as his allotment the land upon which he had settled, and which he occupied. If he is denied this right, he may by virtue of a special act of Congress sue in the Federal court for redress.

3 Fed. Stat. Ann., 503.
31 Stat. at Large, 760.

The general purport and meaning of these statutes are further commented on in the opinions in the following cases:

Waldron *vs.* United States, 143 Fed., 413.
Smith *vs.* United States, 142 Fed., 225.
Guyette *vs.* McWhirk, 154 Fed., 784.

That the right of selection and allotment is by no means defeated by the non-concurrence of the Secretary will be obvious from a consideration of these cases.

In

Bonifer *vs.* Smith, 166 Fed., 846,

the Secretary had denied the right claimed by the Indian. The case of

Reynolds *vs.* United States, 174 Fed., 213,

is a direct adjudication to the same effect, as will be seen from the following quotation from the opinion:

> "The act providing for the allotment in severalty of lands within the reservation (act March 2, 1889), c. 405; 25 Stat., 888) prescribes definitely (section 8) the number of acres each qualified claimant is entitled to, and provides (section 9) that allotments should be 'selected' by the Indians, heads of families 'selecting' for their minor children, and that the agents shall 'select' for each orphan child. The making of the allotments is by special agents (section 10), whose duty it is to certify them in duplicate to the Commissioner of Indian Affairs, who in turn transmits one copy to the Secretary of the Interior. When the Secretary approves the allotments, he (section 11) causes patents to be issued in the names of the allottees. It will be perceived that the selection of specific land is a necessary preliminary step to an allotment. To take that step was the duty of the complainants, and no action of the officials could prevent them doing so. If the officials then denied the right of complainants to the land selected, and refused to proceed and make the allotment to them, the circuit court was open, and its decree in favor of complainants' right to the particular land selected, when certified to the Secretary of the Interior, would have the same effect 'as if such allotment had been allowed and approved by him.'"

The policy evidenced by the Dawes act referred to had found expression in a number of acts of Congress opening

Indian reservations, and within a month after the transaction under investigation it was recognized in the act opening to settlement the Blackfeet Reservation, by which it was provided that there should be allotted to each Indian 40 acres of irrigable land and 280 acres of grazing land, or, at the election of the allottee, 320 acres of land, valuable only for grazing, the allotments to be made *"under the provision of the allotment laws of the United States"* to all persons having tribal rights on the reservation.

34 U. S. Stat. at Large, 1035.

The Indian plaintiffs in error had, accordingly, an inchoate right to select the lands as their allotments. They had improved them, presumably with a veiw to selecting them eventually as their allotments.

When they should eventually select the lands either upon the opening of the reservation or upon the exercise by the President of the power reposed in him by the act of 1887, as amended by the act of 1891, they would be powerless to alienate the same for a period of twenty-five years, the Government meanwhile withholding the patent in fee from the allottee.

3 Fed. Stat. Ann., 494.

And, lest the language of the act so providing might leave some room for the contention that the Indian might make some disposition of the land to which he became entitled, it provided in explicit terms that, "if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Id.

Beck *vs.* Flournoy L. S. Co., 65 Fed., 30-34.

There can be no question that under this statute a contract affecting the right of an Indian to his allotment made

in anticipation of his selection is void equally with one executed after the allotment has been completed.

Confessedly such a contract as that relied on here would be void if made by the Indian with any one save one acting or assuming to act under authority from the Government of the United States. In other words, the Indian is disqualified from conveying, incumbering, or in any manner embarassing by contract his right to select his allotment given to him by the act of 1887. Not only does the act permit the Indian to select those lands upon which are his improvements regardless of any contract he may have entered into with any person not to do so, but the act of Congress provides that he shall do so, apparently making it obligatory.

3 Fed. Stat. Ann., 493.

This right of selection is akin to the pre-emption right, and such a right has never been held or regarded as either assignable or the subject of a relinquishment. While one in the occupation of public lands, intending to enter them under either the pre-emption or the homestead law, might deliver up the same with his improvements to a purchaser, who, if qualified, might make his entry thereof,

Catholic Bishop of Nesqually *vs.* Gibbon, 158 U. S., 155,

and a note given in payment for the improvements and possession surrendered would be supported by a sufficient consideration,

Moore *vs.* McIntosh, 6 Kan., 39,
McWilliams *vs.* Bredges, 7 Neb., 419,
Tarrance *vs.* Hatfield, 71 Ala., 234,
Paxton Cattle Co. *vs.* Arapahoe First N. B., 21 Neb., 621,

he cannot transfer the right to enter,

Porter *vs.* Bishop, 25 Fla., 749,

and it needs no argument to establish the proposition that if he refused to surrender possession after having contracted in form to do so, there would be available no means to dispossess him.

In a memorandum opinion filed by the learned judge before whom the cause was heard below, the view was expressed that one Indian might surrender and relinquish his preference right to an allotment of a particular tract of land to another Indian, and from this premise it was reasoned that, as the purpose of the restraint on alienation was to protect the Indian from the greed and superior intelligence of the white man (Beck *vs.* Flournoy, *supra*), the right of selection might be surrendered to the General Government. "There is certainly," adds the trial judge, "no law or statute which forbids it."

Record, p. 32.

The appellate court gives some countenance to this view.

Record, p. 52.

In support of the idea that one Indian may surrender and relinquish his preference right to a particular tract in favor of another Indian, reference is made to

Williams *vs.* First Nat. Bank, 216 U. S., 582, and Hy-Yu-Tse-Mil-Kin *vs.* Smith, 194 U. S., 401.

In the first place, the Williams case simply holds that a note given by one Indian to another for the surrender of lands to which the latter has a claim, by virtue of settlement, improvement or selection, is supported by a sufficient consideration. The case holds just exactly what the authorities above quoted declare and it extends no farther than they. In that case a controversy arose between two Indian claimants for the same ground. One was induced to abandon the claim for which he was contending before the tribunal charged with determining the rights of the parties, in con-

sideration of the note of the other. The court held that a recovery could be had on the note.

This is far from holding that if one Indian entered into a contract with another Indian by which, upon a consideration, the latter agreed to abandon land in his possession and to which he enjoyed a preference right of selection, and to relinquish his right thereto, and receiving such consideration he refused to quit or to surrender possession of the land, the bargainor could have some kind of an action in the nature of ejectment to put him out, or in equity to compel the execution of a relinquishment.

The decision in the case of

Paxton Cattle Co. *vs.* Arapahoe F. N. B., *supra,*

was based upon earlier decisions of the Supreme Court of Nebraska.

Referring to these in

Anderson *vs.* Carkins, 135 U. S., 483,

the court admitted in effect the soundness of the doctrine they announced, but pointed out that there is a vital difference between holding a note given for a settler's improvements and the surrender of his possession as valid, and holding that the purchaser acquired any right to the land which he can enforce in court if the settler repudiates the agreement and refuses to recognize it as binding on him.

Nor does the other case cited by the learned trial judge even carry an implication of the validity of a contract by which one Indian relinquishes in favor of another his preference right of selection. In fact, the question does not seem to have arisen in the case in any way. Apparently this is a miscitation.

It is not to be understood that the plaintiffs in error dispute the proposition that one Indian entitled to tribal rights on a reservation may buy out the improvements of another, and, surrendering the possession to the other, would lose his right thereafter to select the land thus theretofore occupied

by him. They are not at this time asserting whether a note given by the purchaser to the Indian surrendering would or would not be good, as it would be in the case of a homesteader under similar circumstances, nor whether the agent would or would not be authorized to treat the whole transaction as void and to restore the property to the seller either with or without the restoration of the note. There is abundant reason for believing that such a note would be void. If it were valid, an enticing opportunity would be presented to the improvident Indian to sell his holdings to another Indian and then negotiate the note. It is believed that the agent would refuse to recognize an injudicious sale for cash even, and would compel a sagacious purchaser to restore to the original owner the possession of lands obtained at an unreasonable bargain, the result of which would be to leave the prodigal seller without a home. It is the common understanding that these people are regarded as under tutelage because incapable of taking care of their own affairs, and, therefore, incompetent to contract.

The statement of the learned trial judge that "the right of one Indian to surrender and relinquish his preference right of allotment of a particular tract of land to another Indian has been expressly recognized" cannot be sustained at all, if it is intended to embrace Indians on a reservation in the charge of an agent, and in any case to the extent only that when the surrender is actually accomplished a note given in consideration of the relinquishment arising from such surrender is valid. Could an action in ejectment or suit for specific performance be successfully prosecuted in favor of one Indian against another as to lands in dispute between them on an Indian reservation? The trial court would undoubtedly have recognized the error of the proposition asserted in the opinion on which the judgment rests had it been mooted at the hearing.

Upon the consideration of the demurrer to the complaint the trial court expressed the view that the power to make the instruments in question could be found in the act of

June 21, 1906 (1909 Supp. Fed. St. Ann., 208), which provides:

> "That any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under rules and regulations provided by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser of the same as if final patent without restriction had been issued to the aliottee."
>
> Record, p. 20.

Had the application of this statute been debated the court would scarcely have felt that it had any controlling significance. The fact that it is not adverted to in the later opinion of the court suggests the idea that the view originally entertained as to it was abandoned.

The expression "lands * * * within a reclamation project" has a significance in connection with the work of the reclamation service that of necessity excludes lands within an Indian reservation. Section 3 of the reclamation law authorizes the Secretary of the Interior, on beginning a survey for any contemplated work of irrigation, "to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works." Section 4 requires him, on determining to enter upon the work, to "give public notice of the lands irrigable under such project." The same section contemplates that within the area thus capable of irrigation there may be held "lands in private ownership which may be irrigated by the waters of the said irrigation project," with which owners' contracts for a supply of water from the Government ditch or canal would be made.

In the light of these provisions of the original law the language of the act of June 21, 1906, has a very plain meaning. It contemplates that some Indian may have an

allotment—inalienable for a period of twenty-five years—that there may, indeed, be many such "within a reclamation project" that are susceptible of irrigation from the system to be installed, and which, were it not thus held "in private ownership" would be "public lands" which the Secretary was directed by section 3 of the act to withdraw from entry except under the homestead law. It was contemplated that the Indians holding these lands might scarcely be able to pay their proportionate share of the cost of the work as a condition of being supplied from the canal, and that their ownership of their inalienable allotments might embarrass and often render impossible the establishment of a system much to be desired and calculated to make most inviting to settlers large areas of irrigable lands. This act authorized an Indian, by the approval of the Secretary, to sell any land so situated to any purchaser he could find, notwithstanding the restraint on alienation in the general allotment law. It was doubtless contemplated that the Secretary would require that the Indian be provided with other lands or that some provision would be made for the investment on his behalf of the purchase money.

Nothing in this act, however, gives any color to the idea that he may sell to the Government, or that the officers of the Government are authorized to expend any portion of the reclamation fund, in buying up Indian lands within a reclamation project capable of irrigation from the work of the same. There is no provision of the law for the disposition of any lands so purchased by the Government. All "public lands" within it are open to entry under the homestead law, subject to the payment of a proportionate share of the cost of construction. There is no law that would authorize the disposition of lands so acquired by the Government by purchase. If they should be disposed of under the homestead law—and they could not be regarded as "public lands" within the meaning of that law—it would be impossible to get back a dollar that had been paid to the Indians for them or to charge any different price for them than that charged

for adjacent "public lands." The subject need not be followed. The law does not sanction in any way the purchase by the Government of Indian allotments.

In the second place, it cannot be operative as to lands within an Indian reservation because the general reclamation act has no reference to such lands. The Government is powerless to sell or dispose of such lands to homesteaders for the reimbursement of the reclamation fund. Finally, the lands in question are not lands "within a reclamation project," because those are lands capable of irrigation from the system. The lands to be irrigated by the project in question are hundreds of miles away from those from which the judgment requires that the plaintiffs in error be ejected.

Moreover, the act contemplates the case of an allotment already made of a tract of land of which the Indian is absolute owner, save that he is restrained from alienating it. It has no reference to a contract for a relinquishment of an inchoate right of allotment. It is almost impossible to conceive of such a right with respect to lands within a reservation before they become "public lands" open to reclamation under the general law.

However the judgment may be supported upon the grounds later advanced by the trial judge, it is evident that the statute to which appeal was made by him in the first place affords no justification for the conclusion at which he arrived.

Upon the basis eventually relied on, that one Indian may relinquish his preference right to an allotment of a particular tract of land to another, the conclusion was reached that he can likewise surrender to the Government the same right. That conclusion would not follow though the premise were true. And that leads to the second inquiry which this appeal presents, namely:

2. May officers of the Federal Government devote a portion of an Indian reservation to some Government purpose disassociated from that for which the reservation is set apart?

The St. Mary's irrigation project contemplates the storage of waters within the Blackfeet Reservation by damming the outlet of the lower St. Mary's Lake near the headwaters of the Milk River, with a view to the irrigation of lands in the lower portion of the valley of that river within the State of Montana and beyond the Blackfeet Reservation.

Report of Reclamation Service for 1910, pages 160, 161, 154-156.

This report is made pursuant to section 2 of the reclamation law. Conceding, though the idea is not admitted at all, that one Indian may relinquish his right of selecting particular lands within a reservation in favor of another, what right has "the Government" to accept such a surrender of possession and the right of selection which the Indian has under the act of Congress with a view to utilizing such lands as a storage basin for the collection of water to irrigate land beyond the reservation?

"The Government" is not infrequently regarded as an institution of practically unlimited powers in connection with the Indians and the public lands. Undoubtedly the Government is vested virtually with unrestricted authority over these subjects, but only in the sense that the Congress is the essential part of the Government. "The Government," in the sense of the executive officers charged with the execution of the laws, is vested only with such powers as Congress sees fit to delegate to it. The Government may undoubtedly devote the lands within an Indian reservation to any purpose it may see fit. It may turn the Indians out without a dollar or a crust of bread and dispose of the lands set apart to them as it pleases. But "the Government," meaning the Reclamation Bureau or the Secretary of the Interior, must find in

the laws of Congress some express authority to take these lands away from Indians and use them for some purpose other than as the home of Indians and for their benefit.

So, while it may be true that an Indian may relinquish to the General Government his preference right to a particular tract within a reservation, in order that it may be devoted to some use consistent with that for which the reservation was created—as, for instance, that agency buildings may be erected thereon, or a school-house for the use of the reservation children, or a grist-mill—"the Government," meaning in this particular instance the officers charged with the administration of the general reclamation law, has no authority to bargain with an Indian for a relinquishment of his right of selection or for the possession of the lands occupied by him within the reservation in order that such lands may be devoted to a use in connection with an irrigation project bearing no relation to the Indians or the improvement of their lands.

By solemn act of Congress, approved May 1, 1888, ratifying an agreement with certain Indians, the Blackfeet Reservation was established as a permanent home for them and their descendants. The lands were by this act of Congress,

Act of May 1, 1888, 25 Stat. at Large, 113, 139,

and by its ratification of the agreement, set apart for the use of the Indians entitled to inhabit it; they were withdrawn from settlement; they ceased to be "public lands" or subject to the operation of any of the general laws in relation to the disposition of the public domain.

"The Government" was therefore powerless, unless by virtue of some special statute of Congress, to devote any portion of the lands to any other use. Though Congress might, as above indicated, have made some other disposition of these lands, if it should by law so provide, it could manifestly not do so except by a violation of its pledge to the Indians, unless their consent should be first secured. Though it might have opened the reservation to settlement without the consent of

the Indians, it did not do so. And the statute of March 3, 1901, reposing in the Secretary power to negotiate with the Indians for the cession, expressly provided that no agreement entered into should be valid until ratified by Congress.

6 Fed. St. Ann., 527.

It is, accordingly, a sensible and a just rule that no general act of Congress is to be construed as affecting any lands within the reservation unless its application thereto is obvious from its terms.

No statute has been pointed out which authorizes any officer of the Government, however exalted his official position, to take one acre of these lands away from the Indians to utilize them for the benefit of settlers beyond it or for any other governmental purpose than that to which they were devoted by the act of Congress referred to. If the Reclamation Bureau or the Secretary of the Interior in the execution of the reclamation act may flood 800 acres of the reservation for the benefit of people living three hundred miles beyond its borders, they may flood 8,000 acres or 8,000,000 acres.

If they may use a portion of the reservation for such purposes, they may use another portion for some other purpose, the accomplishment of which is entrusted to the Secretary of the Interior or some bureau of his Department. The Geological Survey, for instance, might want a part on which to establish a station for its work; the Bureau of Animal Industry might like to carry on within it experiments in its line, and thus the Indians might eventually be crowded into a mere fraction of the area for the enjoyment of which by them the nation's faith is pledged.

Provision is made by the act of March 3, 1909, for the acquisition by railroad companies traversing an Indian reservation of limited areas for reservoirs and ballast pits, but the law carefully guards the rights of the Indians by strictly limiting the area which the Secretary may set apart for such purposes and providing that the sums received in payment shall be applied to their use.

Fed. Stat. Ann., 1909; Supp., 239.

It took a law of Congress to authorize the Secretary to apply these very limited areas to any purpose other than to the use of the Indians. He had no such right otherwise.

The officers of the Reclamation Service had no authority to bargain for or to procure from the Indian plaintiffs in error the relinquishment of their rights to have the lands in question allotted to them or for the surrender of possession thereof that they might be flooded in connection with the St. Mary's irrigation project, and it is respectfully and deferentially submitted that the circuit court is without power to compel them to vacate the lands in question that they may be so flooded.

It is indeed provided by section 7 of the reclamation act (7 Fed. Stat. Ann., 1100):

> "That where, in carrying out the provisions of this act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Interior under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

Not unlikely the present action was brought, and possibly the negotiations resulting in the instruments upon which reliance is placed as operating as a relinquishment of the allotment rights of the Indian plaintiffs in error in the lands in question were executed, in the belief that the alleged contracts were warranted by this section. But it will be recognized upon reflection that this statute does not cover the case at all. If there were no one in the occupancy of the land under consideration at all, the foregoing argument would be equally forceful; the Interior Department would

have no right to invade the reservation for the purpose of turning any portion of it into a lake, whether there were or were not any allotment rights to the portion which it desired thus to transform.

Evidently the Department proceeded upon the idea that if it should secure the preference right of the Indian plaintiffs in error it was at liberty to appropriate these 800 acres for the use of the Reclamation Bureau. That section clearly has no reference to conditions such as are here presented. It never contemplated the extinction of the Indian title to lands within a reservation, if for no other reason than because no provision is made as to the officer with whom negotiations are to be carried on to that end or as to how the title is to be transferred.

Under settled rules it is too general in its character to permit it to be made applicable to lands within a reservation or to contemplate a relinquishment of a preference right of selection by an Indian within it, of lands occupied by him, which could then be applied to the uses contemplated by the act only by a plain violation of the convention with the Indians, agreeably to which the act of Congress was passed establishing the reservation.

It was said below that, when by that act the Secretary was authorized to acquire by purchase or condemnation any rights or property necessary to carry out any irrigation projects, he was authorized to take lands within an Indian reservation because if Congress had intended that he should not acquire land within Indian reservations "it would have made some reservation in the act."

On the contrary, we assert that no act general in its character is to be deemed authority to take lands within an Indian reservation for any purpose, because to that extent the general act would operate as a repeal of the special act creating the reservation, and in this particular instance it would be a violation of the faith of the nation pledged in the agreement that the lands should remain devoted to the use of the Indians.

The act in question would be a repeal, if given such a construction, of the act of 1895, by which the whole reservation was set apart to the use of the Indians, and repeals by implication are not favored in the law.

> "*As a rule general laws will not impliedly repeal those which are special or local.* 'It is the established rule of construction that the law does not favor a repeal by implication, but that where there are two or more provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions. A special statute providing for a particular place, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it.'"
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> 1 Lewis' Sutherland on Stat. Const., 274.

It is obvious that the statute in question can confer no authority to acquire lands forming part of an Indian reservation, because there is no provision made for carrying on the negotiations for a purchase or the proceedings in condemnation. If the lands desired are occupied by Indians who propose to select them, their rights must be acquired. The difficulties suggested heretofore are met in any attempt to purchase from them their allotment rights. They are incompetent generally and are specifically prohibited from entering into any contracts in relation to their allotment right. The statute making them so would be repealed *pro tanto* by the present one if it were stretched to embrace lands within a reservation. Who is to represent the individual

Indian in bargaining with the Secretary? But even if that difficulty were obviated another arises. The right of occupancy of the *whole* reservation is in *all* the Indians, subject to such allotment rights or right of temporary possession as the law may accord to individual Indians. The rights of the Indians as a whole must be acquired. If by purchase, how are the negotiations to be carried on? If they fail, either in the case of the individual Indian or the tribe, against whom are condemnation proceedings to go and who is to represent these dependent people in such a lawsuit? It is idle to follow these inquiries. That statute affords no justification for taking lands within this reservation to utilize them for flooding purposes in aid of an irrigation project to reclaim lands outside of it.

These observations are equally applicable to the general statute upon which reliance has been placed authorizing the officers of the Government to proceed by condemnation in any case in which, by act of Congress, authority is granted to acquire property for Government purposes.

The question now being canvassed was considered in a later case in the same court in which this action originated.

> La Breche *et al. vs.* United States (not yet officially reported).

In that case lands on this same Blackfeet Reservation occupied by certain Indians had been selected by them as their allotments, but the Secretary of the Interior refused to approve the selections because meanwhile it had been determined likewise to utilize them as the site of a reservoir. In awarding the lands to the Indians the learned District Judge, Bourquin, coming to the bench on the retirement of the judge who had heard this cause, said:

> "The lands involved are of those reserved by treaty and acts of Congress for the permanent home of the tribe to which plaintiffs belong and for allotments to its members. Lands so reserved for Indians are thereby placed beyond all other disposition save by

Congress. Although a member of the tribe has but an equitable interest in tribal lands, no one but Congress can divest him of it. General statutes authorizing the executive officers of the Government to set apart or reserve lands for public uses, will not empower them 'to interfere with reservations existing by force or a treaty.'

"See—

"Spalding *vs.* Chandler, 160 U. S., 405.
"Lone Wolf Case, 187 U. S., 566, 568.
"Choate *vs.* Lapp, 224 U. S., 670, 677.
"Burfening *vs.* Ry. Co., 163 U. S., 323.
"Scott *vs.* Carew, 196 U. S., 109.
"Leecy *vs.* U. S., 189 Fed., 289.

"Congress in 1907 authorized the Sec'y Interior to reserve some of the tribal lands for specific tribal purposes only. 34 Stats., 1036. Under familiar rules of construction reservations for purposes herein involved, if non-tribal, were thereby excluded. The Sec'y was then by Congress also authorized to construct irrigation works for the tribal lands reasonably necessary therefor. But any effort to reserve the lands involved for the latter purpose if made at all, seems not to have been made until 1910 and after selection of said lands by plaintiffs for allotment to them, too late, as will appear later herein. Previous efforts made to reserve said lands, seem to have been for the benefit of other than tribal lands or uses. It follows that all attempted withdrawals or reservations of the lands involved by the officers of the Interior Department for reservoir purposes are invalid."

The same inviolable character of a reservation set apart by act of Congress as a home for any of its Indian wards is assigned to such reservation by the Circuit Court of Appeals of the Eighth Circuit in the case of

Leecy *vs.* U. S., 190 Fed., 289.

In that case it appeared that an Indian had selected lands which had been reserved as a sawmill reserve, it being the

purpose of the Department to supply the Government from the lands in question with lumber with which to build houses on the reservation for certain Indians whom it was desired should take up homes thereon.

In the course of the opinion the court quotes from the Dawes act and a special act declaring that allotments of lands within the reservation in question shall be made in accordance with the provisions thereof, and sets out the sections of the Revised Statutes giving very general powers concerning the Indians to the Secretary of the Interior and the Commissioner of Indian Affairs.

The court then continues:

> "*None of the provisions conferred the power claimed.* It is not necessary to consider whether the provisions in the general allotment law quoted control allotments under the act of April 28, 1904. It is true, if this law applies, allotments must be 'made under such rules and regulations as the Secretary of the Interior may from time to time prescribe.'
>
> "The power of Congress over the whole subject of our relations to the Indians is plenary. Lone Wolf *vs.* Hitchcock, 187 U. S., 553; 23 Sup. Ct., 216; 47 L. Ed., 299. But it does not follow, because Congress makes a valid law and intrusts its execution to the head of an executive department, with power to make rules and regulations for its execution, that he is thereby clothed with plenary power to make such rules and regulations as would not aid in the execution of the law, but nullify its provisions. In Williamson *vs.* United States, 207 U. S., 462; 28 Sup. Ct., 177 (52 L. Ed., 278), the Supreme Court said:
>
> " 'True it is that in the concluding portion of section 3 of the timber and stone act (act June 3, 1878, c. 151, 20 Stat., 90 (U. S. Comp. St., 1901, p. 1546) it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office'; but this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and

> cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred.'
>
> *"Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the Government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations."*

And then, referring to the statute giving to the District Court jurisdiction of this action, the court continued:

> "If under any of these laws the Secretary of the Interior could withdraw lands from allotment, or, upon his judgment that lands authorized to be allotted by Congress ought not to be allotted, refuse to approve an allotment when submitted for action, the very statute under which this action was brought, and which was enacted after all the statutes relied on were passed, would be practically nullified."

The very persuasive opinion concludes with the following pertinent observations:

> "A strong argument is made tending to show that power should be vested in the President or some other officer of the Government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law should be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

It will be noted that the effort held futile in that case was to devote some of the lands which the act of Congress directed

should be allotted among the Indians to a use deemed beneficial to those for whose benefit the reservation had been established—to a communal tribal purpose. Here the act justified by the judgment sought to be reversed is an application of lands within the reservation set apart by a solemn act of Congress for the exclusive use of the Indians, to a purpose wholly foreign to that for which it was created, to meet the wants of white settlers hundreds of miles beyond its bounds.

The opinion affords a very complete answer to the views expressed by the court from which the cause comes in response to the argument now being advanced, namely, that the officers of the Reclamation Bureau had no authority to enter into any contract with any one with the purpose in view to turn a portion of the Blackfeet Reservation into a reservoir for use in connection with a project carried on under the provisions of the reclamation law. It is said in the opinion:

> "The Commissioner of Indian Affairs having management of all matters arising out of Indian relations, and charged with the duty of safeguarding the Indian's rights, acted under the direction of the Secretary of the Interior, as required by law. By section 7 of the reclamation act, it is provided that whenever in carrying out the provisions of the act it should become necessary to acquire any rights or property 'the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or condemnation,' etc. Under the authority of that act the relinquishment was obtained."

The very general statutes clothing the officers referred to with the exclusive powers mentioned are quoted in the opinion in the Leecy case, which unanswerably says that they must be used to carry out the law, not to defeat or annul it. The law says that the lands in question, the "whole reser-

vation, shall continue to be held by these Indians as a communal tract";

29 Stat., 355,

that such lands, and all such lands, are "set apart and reserved as separate reservations for them."

No general authority to the Commissioner of Indian Affairs to superintend the execution of the laws in relation to the Indians or to safeguard their interests, nor to the Secretary of the Interior to exercise supervisory control over the administration of such laws or those in relation to the public lands can be construed to authorize the execution of a contract having as its purpose to set one of those same laws at naught.

In the Circuit Court of Appeals reference was made, without claiming much under it, to the act of 1910, as follows:

> "SEC. 13. That the Secretary of the Interior be, and he is hereby authorized, in his discretion, to reserve from location, entry, sale, *allotment* or other appropriation, any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress: *Provided*, That if no irrigation project shall be authorized prior to the opening of any Indian reservation containing such power or reservoir sites the Secretary of the Interior may, in his discretion, reserve such sites pending future legislation by Congress for their disposition, and he shall report to Congress all reservations made in conformity with this act."
>
> 36 Stat. at Large, 858.

Congress, by this act, for the first time authorized the Secretary of the Interior to deny to the Indians on a reservation the right to take as allotments certain lands within the reservation deemed by him "valuable for power or reservoir sites, or which may be necessary for use in connection

with any irrigation project." The enactment of this law is evidence of the most persuasive character that in the opinion of Congress no such authority then existed in that officer. Even that law does not reach to the present case and cannot be construed to apply to the case of lands to which the inchoate right of selection has attached by virtue of their being occupied and improved by particular Indians.

The full extent of the authority granted by that act is to reserve lands valuable for reservoir sites or power sites or necessary in connection with Government irrigation projects from allotment or other appropriation. Even that act does not authorize the Secretary to devote any such lands to such purposes while the reservation is intact and the faith of the Government is pledged that every acre of it shall be devoted to the use of the Indians on it. Obviously a construction must be given the act which will make it consistent with the observance of the faith of the nation pledged to the Indians.

Accordingly, it must be held to mean that in anticipation of the ultimate opening of the reservation and the allotment of the lands in severalty within it to the Indians, the Secretary may declare in advance that certain lands valuable or necessary, as aforesaid, shall not be subject to selection as allotments.

A proclamation or order to that effect would operate, no doubt, to deny to any Indian the right thereafter to settle upon any such lands with a view to selecting them when his inchoate right should become perfected, either by the order of the President, under the general allotment act, or some act of Congress opening the reservation, or otherwise extending the completed right. But it is submitted that it never could have been the intention of Congress, by the act in question, to take away from an Indian the right to select lands which prior to any order of withdrawal under it had become his home, and which he had improved and cultivated, particularly as the act makes no provision for com-

pensation to him for his improvements, as it does in the case of lands patented, referred to in the succeeding section.

But in any case, the full extent of the power granted by the act to the Secretary is to withdraw the lands within the reservation from allotment. They are, of course, subject to disposition in no other way. He is given no power, while the reservation exists and while the act of Congress setting it apart for the sole use of the Indians is effective, to turn the reservation or any portion of it into a reservoir to subserve the needs or the interests of people beyond its border.

But whatever construction might be given to the act in its application to situations arising after its passage, it can in no manner affect the rights of the parties to this litigation, further than as it indicates that prior to its passage there was not even any power in the Secretary to withdraw from *allotment* lands within a reservation, much less to flood them for utilization in connection with irrigation projects to reclaim lands beyond its borders.

The brief of defendant in error in the court below said that February 28, 1903, the Secretary of the Interior "withdrew" under the terms of the reclamation act a strip of ground about the St. Mary's Lake, including the land in question.

The record discloses nothing of that character, nor does the chronology of the irrigation project involved, as given in the report of the Reclamation Bureau, make any mention of such an act.

> Report of Reclamation Service for 1910, pages 160-161, 154-156.

But the reclamation act gave to the Secretary no power to "withdraw" lands within a reservation. That act authorized him to "withdraw from public entry" certain lands, but since no lands within an Indian reservation are subject to

public entry, the power of withdrawal vested by that act in the Secretary cannot possibly extend to lands within a reservation. And the plain reading of the statute forbids any claim that it does.

In the same connection it was asserted that again on September 15, 1911, the Secretary "withdrew," under the act of 1910, the lands in question. That fact, if it be a fact, is likewise not shown by the record, and apparently counsel mentioned it only in pursuance of the expressed purpose of fully informing the court on the chance that it might find reason in some of the acts of Congress referred to or the activities of the Department recited to sustain the judgment under review. This action was commenced May 17, 1911, about four months before the alleged withdrawal of September 15, 1911. If up to that time nothing had been done by which the plaintiffs in error had been divested of their rights to the lands in question, they were theirs under the law, and nothing remained to be done by them to invest themselves with the full legal title thereto save to have their patents issued, for the securing of which they were then proceeding under the law, certainly nothing then done, under color of an act not in existence until their rights had attached and become fixed, could operate to divest them of their property. The act of Congress is not to be construed as thus effective in terms.

If no other construction is possible it would then be interesting to inquire whether Congress, having granted land to one, may, after he has fully earned it under the law, prior to the issuance of patent, take it away from him. It is unnecessary to canvass this question, because it is not to be conceived that any such operation will be assigned to the act. The absolute right to this land became vested in the plaintiffs in error immediately on the passage of the act opening the Blackfeet Reservation, approved March 1, 1907,

34 Stat. at Large, 1035,

by which it was provided "that as soon as all the lands embraced within the said Blackfeet Reservation shall have been

surveyed the Commissioner of Indian Affairs shall cause allotments of the same to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations, and who may rightfully belong on said reservation;" unless, of course, their rights had previously been relinquished in consequence of the instruments the validity of which is questioned herein.

The act of 1907 providing for the opening of the Blackfeet Reservation to settlement authorized the Secretary to make certain reservations for tribal purposes as follows:

> "The Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved so long as needed and so long as agency, school, or religious institutions are maintained thereon for the benefit of the Indians, not exceeding two hundred and eighty acres to any one religious society; also such tract or tracts of timber lands as he may deem expedient for the use and benefit of the Indians of said reservation in common; but such reserved lands, or any part thereof, may be disposed of from time to time in such manner as the said Secretary may determine."
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> 34 Stat. at Large, 1036.

As pointed out in the opinion of Judge Bourquin the designation in detail of these particular purposes for which reservations were to be made forbade by the clearest implication that any reservations should be made for any other purpose. The remaining lands were open to selection and allotment and those not allotted and not reserved as provided for in the act, were to be disposed of as therein provided for the benefit of the Indians. Indeed, one of the reasons which prompted Congress to pass the act of March 1, 1907, was that the Indians might obtain by the disposition of the excess lands within the reservation the means whereby to provide themselves with cattle and equipment by which they might make a living on the lands allotted to them.

The Circuit Court of Appeals gives first place in its opinion to an argument based upon a section of the act of 1895,

29 Stat. at Large, 355,

as follows:

> "Since the situation of the Blackfeet Reservation renders it wholly unfit for agriculture and since these Indians have shown within the past four years that they can successfully raise horned cattle and there is every probability that they will become self-supporting by attention to this industry, it is agreed, that during the existence of this agreement no allotments of land in severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract upon which their herds may feed undisturbed and that after the expiration of this agreement the lands shall continue to be held until such time as a majority of the adult males of the tribe shall request in writing that allotment in severalty shall be made of their lands;
>
> "*Provided,* That any member of the tribe may with the approval of the agent in charge fence in such area of land as he and the members of his family would be entitled to under the allotment act and may file with the agent a description of such land and of the improvements that he has made on the same and the filing of such description shall give said members of the tribe the right to take such lands when allotments of the land in severalty shall be made."

It is contended that as it is not shown that the plaintiffs in error had complied with this statute, they had no right to the lands in question which they could relinquish, and presumably no right to select them on the passage of the act of 1907.

Even if it should be admitted that this contention is correct, the situation would not be materially changed. If these individual Indians had no claim whatever to the particular lands in question, the entire body of the Indians had the right to their uninterrupted use by virtue of the very section

in question, which provides that "this whole reservation shall continue to be held by these Indians as a communal grazing tract." The word "whole" was doubtless inserted to make it clear to the Indians that *none* of it should be taken away from them nor any part of it, however small, except as in the agreement specified, devoted to any other use. That is the basis of our contention that the instruments were void because neither the Secretary nor any other officer had the right to enter into any contract with reference to them with a view to devoting them to any purpose other than the use of the Indians.

But the contention cannot be admitted that the Indian plaintiffs in error had no rights, inchoate or otherwise, in these lands, because of their failure to file, as provided by section 5. The Secretary and the officers of the Reclamation Service evidently believed they had. They dealt with them upon that assumption.

It is respectfully submitted that in entering into the agreement of 1895 the Indians were giving up no rights which they theretofore enjoyed. They were surrendering a portion of the reservation, and we ought to look for new rights accruing to them rather than the abandonment of those they then enjoyed. So it was held by this court and the Supreme Court with reference to the agreement with these same Indians made in 1888.

Winters *vs.* United States, 207 U. S., 564.

Under the existing law, the President could at any time he chose direct that the lands on the reservation be allotted in severalty. The Indians insisted that he should not exercise that right as to the reservation in question, but that the *whole* of it should remain a communal grazing tract. The act provided that any Indian might fence a tract equal to the amount he and his family would be entitled to under the allotment act, file a description of it with the agent, and thus acquire the right to have it allotted to them when allotments should eventually be made. Note that it was clearly

contemplated that allotments would be made at some time. It is submitted that this provision never was intended to permit one Indian to invade lands in the actual possession of another as his home, and to acquire a preference right to it by fencing it with or without the approval of the agent. It never was intended to divest the individual Indian of the right which he would have under the allotment law to have allotted to him, if he selected them, the lands occupied by him as his residence. It gave the individual Indian another right, namely, to secure the right to be allotted lands on which he did not live, but which he had fenced and improved. If the contention now apparently made is correct, no Indian on the Blackfeet Reservation has any right to be allotted the lands on which he lives unless he has filed, and if he has failed to file, the allotting officers may give the lands made valuable by the labor of one Indian to another, or leave them subject to disposition, as otherwise provided in the act of March 1, 1907.

Another feature of the act is persuasive on the main contention. After the allotments are made to the Indians and some lands set aside for specific purposes therein named, it is provided that all the remaining lands shall be valued and disposed of, except sections sixteen and thirty-six, for the benefit of the Indians, the avails going into a fund for their use, and that even as to sections sixteen and thirty-six, granted to the State, the General Government shall pay into the fund for them at the rate of $1.25 per acre. There was no reservation from general disposition in this way of lands within the reservation that had been made reservoir sites or withdrawn for reservoir sites, because Congress recognized that there had existed no law by which lands within the reservation could be devoted to any such use. In other words, it was fully appreciated by Congress that the *whole* reservation—every acre of it—had been held by the Indians "as a communal grazing tract."

It is worthy of note that the learned judge who tried the case, enjoying a familiarity with the Federal statutes affect-

ing the Indians and public lands, unexcelled, it may safely be asserted, by any man either at the bar or on the bench, passed that particular statute without notice in either of the opinions filed by him and appearing in the record.

One statute was said in the opinion on the demurrer to the complaint to give support to the contract challenged; another was said in the opinion on the motion for judgment on the pleadings to be the true warrant, and a third is pointed to by the reviewing court as the authority for the officers assuming to act for the Government in making the contracts.

It was not deemed of sufficient importance to become the subject of comment in any of the opinions filed herein, but reference was made in the argument below to another section of the agreement embodied in the act of 1898 as follows:

> "It is further agreed that whenever in the opinion of the President of the United States the public interests require the construction of railroads or other highways, telegraph or telephone lines, canal and irrigating ditches through any portion of this reservation, right of way shall be and is hereby granted for such purposes under such rules, regulations, limitations and restrictions as the Secretary of the Interior may prescribe, the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians."

Obviously this section does not contemplate Government irrigation projects at all. The Government reclamation idea was still nascient at the time the agreement was entered into. It refers to the granting of rights of way to private owners, individual and corporate, of ditches and canals. The Secretary is to make rules touching the acquisition of rights of way by such. He is to act for the Indians. He is to bargain in their interest. He is to get from the parties who desire to exercise the right such compensation as he thinks right and

it must be expended by him for the benefit of the Indians. This language forbids the idea that the Secretary as one of the bargainors and the individual Indian as his antagonist in the negotiations may enter into a contract for the benefit of the Secretary representing the Government, the purchase price to be paid to the Indian direct. The very language implies the incompetency of the Indians, either individually or collectively, to contract, and makes the Secretary their agent and representative in the bargaining. It is elementary that an agent cannot sell to himself.

In the second place, when the Indians conceded the right to construct canals and irrigating ditches across the reservation, they certainly accorded no right, nor can it be conceived that they considered that they conceded any right, to flood unlimited acres of their territory by turning them into reservoirs. If I grant to one a right of way across my land for a ditch, I certainly do not grant the right to turn the whole of it or half of it or any part of it into a reservoir. Such a construction could not be given to the language in question if it appeared in a private grant. Every intendment in construing the instrument in question must be indulged in favor of the Indians by perfectly well settled rules.

Jones *vs.* Meehan, 175 U. S., 1, 11.

In the brief of the defendant in error in the lower court is set out the following quotation from

Leavenworth Ry. Co. *vs.* United States, 92 U. S., 733:

> "If a right is asserted against the Government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it; in other words, what is not given expressly or by necessary implication is withheld."

And it is asserted that the claims of the plaintiffs in error are to be measured by the rule thus stated. This is an error.

The rule referred to is a rule of legislative grants, founded chiefly upon the fact, as will be observed by reference to the opinion in the case cited and others therein mentioned, that acts granting lands or conferring franchises, or other rights of a similar character, are ordinarily drafted by those who secured the benefit of them. The rule is an application of the doctrine that the language of an act or a contract ought to be construed most strongly against the party who chose the language. For that identical reason, as pointed out in Jones *vs.* Meehan, among others, an agreement with Indians should be construed most favorably to them because the language is not theirs, but is that of the representative of the Government designated to negotiate with them.

Construing the language of the agreement by the guide of the rule repeatedly announced by the Supreme Court of the United States for the interpretation of Indian agreements, there was no authority given by them or extended by Congress to turn any portion of the reservation into a reservoir.

3. The Rights of the Daughters Undisturbed.

Whatever conclusion may be reached regarding the rights of the other parties to the action, it is impossible to contend that those of Lizzie Henkel and Mamie Henkel are in any way prejudiced by the writings in question.

Apparently without any authorization emanating in any way from them, their mother assumed to convey the right which they enjoyed under the statute to select the lands occupied by them as their allotments.

As to these parties, no cause of action is stated at all, and no reason appears why they should not have a decree as prayed in the equity suit.

It might be said in conclusion that this is probably the first action in ejectment ever prosecuted by the Government of the United States against an Indian to recover the possession of lands within an Indian reservation. With suits brought in behalf of its Indian wards the profession is familiar, but it is a departure to find it an antagonist in legal proceedings of these dependent people towards whom it has been repeatedly declared by the courts it stands in the relation of guardian.

A counter-suit brought to procure the lands in question to be allotted to the Indian plaintiffs in error is being prosecuted by virtue of the act of May 31, 1900 (3 Fed. St. Ann., 503), hereinbefore referred to.

It is submitted that the judgment ousting the plaintiffs in error from the premises in question should be reversed, that they may proceed with their suit for affirmative relief.

WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs in Error.

THOMAS J. WALSH,
Counsel for Plaintiffs in Error.